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BUSINESS COURT RULES; STATE BAR STANDING COMMITTEES AND BOARDS; CERTIFICATION OF PARALEGALS; JUDICIAL STANDARDS

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE 29, 2020

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE SUPREME COURT
OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

3 April 2020

ORDERS

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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Best interests of the child—private termination action—likelihood of adoption—dispositional factors—In a private termination of parental rights action between a child's two parents, the trial court did not abuse its discretion by concluding that the child's best interests would be served by termination of the father's parental rights. The mother's relationship with her boyfriend was not sufficiently relevant to require findings on the potential for future adoption, and the trial court properly balanced the factors in N.C.G.S. § 7B-1110(a), including the child's young age, lack of any bond with the father, and need for consistency. **In re C.J.C., 42.**

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SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 6, 7, 8
February 3, 4
March 9, 10, 11, 12
April 6, 7, 20
May 4, 5, 6, 7
August 31
September 1, 2, 3
October 12, 13, 14, 15

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

BANYAN GW, LLC

v.

WAYNE PREPARATORY ACADEMY CHARTER SCHOOL, INC. AND ITS BOARD OF DIRECTORS; SHARON THOMPSON, CHAIR OF THE BOARD OF DIRECTORS; AND JOHN ANKENEY AND LUCIUS J. STANLEY, AS MEMBERS OF THE BOARD OF DIRECTORS; AND VERTEX III, LLC

No. 188A18-2

Filed 3 April 2020

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, No. COA18-378, 2019 WL 438327 (N.C. Ct. App. Feb. 5, 2019), affirming an order granting partial summary judgment in favor of plaintiff and denying defendant Wayne Preparatory Academy Charter School, Inc.'s motion for summary judgment entered on 6 November 2017 by Judge Carl R. Fox in Superior Court, Wake County. On 30 October 2019, the Supreme Court allowed defendant Wayne Preparatory Academy Charter School, Inc.'s petition for discretionary review of additional issues. Heard in the Supreme Court on 10 March 2020.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, for plaintiff-appellee Banyan GW, LLC.

Haithcock, Barfield, Hulse & Kinsey, P.L.L.C., by Glenn A. Barfield, and Robinson Bradshaw & Hinson, by Richard A. Vinroot, for defendant-appellant Wayne Preparatory Academy Charter School, Inc.

No brief for defendant-appellees Board of Directors, Sharon Thompson, John Ankeney, Lucius J. Stanley, and Vertex III, LLC.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for discretionary review as to additional issues was improvidently allowed. Therefore, the decision of the Court of Appeals as to these matters remains undisturbed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice DAVIS did not participate in the consideration or decision of this case.

CABARRUS COUNTY BOARD OF EDUCATION
v.
BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; DALE R. FOLWELL, STATE TREASURER, IN HIS OFFICIAL CAPACITY; STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION, IN HIS OFFICIAL CAPACITY

No. 371PA18

Filed 3 April 2020

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA17-1019, 2018 WL 4441260 (N.C. Ct. App. Sept. 18, 2018), affirming a judgment entered on 30 May 2017 by Judge James E. Hardin Jr., in Superior Court, Wake County. Heard in the Supreme Court on 9 December 2019.

Michael Crowell; and Tharrington Smith, LLP, by Deborah R. Stagner and Lindsay V. Smith, for petitioner-appellee.

Joshua H. Stein, Attorney General, by Matthew W. Sawchak, Solicitor General, Blake W. Thomas, Deputy General Counsel, and Ryan Y. Park, Deputy Solicitor General, for respondent-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and Jill R. Wilson; and Allison Brown Schafer for North Carolina School Boards Association, amicus curiae.

PER CURIAM.

For the reasons stated in *Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer*, No. 369PA18 (N.C. Apr. 3, 2020), the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice NEWBY dissents for the reasons stated in his dissenting opinion in *Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer*, No. 369PA18 (N.C. Apr. 3, 2020).

CABARRUS COUNTY BOARD OF EDUCATION
v.
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; DALE R. FOLWELL, STATE TREASURER, IN HIS OFFICIAL CAPACITY; AND STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION, IN HIS OFFICIAL CAPACITY

No. 369PA18

Filed 3 April 2020

Administrative Law—state employee retirement—contribution-based cap factor—exemption from Administrative Procedure Act—implicit

The adoption of a contribution-based cap factor by the Retirement Systems Division of the Department of the State Treasurer's Board of Trustees was subject to the rulemaking provisions of the Administrative Procedure Act (APA) where there was no indication that the General Assembly intended to implicitly exempt adoption of the cap factor from the APA. The cap factor adopted in this case was void for the Board's failure to utilize the provisions of the APA.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, published decision of the Court of Appeals, 821 S.E.2d 196 (N.C. Ct. App. 2018), affirming a judgment entered on 30 May 2017 by Judge James E. Hardin, Jr., in Superior Court, Wake County. Heard in the Supreme Court on 9 December 2019.

Michael Crowell; and Tharrington Smith, LLP, by Deborah R. Stagner and Lindsay V. Smith, for petitioner-appellee.

Joshua H. Stein, by Matthew W. Sawchak, Solicitor General, Blake W. Thomas, Deputy General Counsel, Ryan Y. Park and James W. Doggett, Deputy Solicitors General, and Katherine A. Murphy, Assistant Attorney General, for respondent-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and Jill R. Wilson; and Allison Brown Schafer for North Carolina School Boards Association, amicus curiae.

ERVIN, Justice.

This case involves a dispute between petitioner Cabarrus County Board of Education and the Retirement Systems Division of the Department of the State Treasurer; State Treasurer Dale R. Folwell,[1] acting in his official capacity; and former executive director of the Retirement System, Steven C. Toole,[2] acting in his official capacity, concerning the manner in which the cost of pensions for certain retirees should be funded. Respondents manage the Teachers' and State Employees' Retirement System, which pays eligible retired state employees a fixed monthly pension based upon the retiree's four highest-earning consecutive years of state employment.

In 2014, the General Assembly enacted An Act to Enact Anti-Pension-Spiking Legislation by Establishing a Contribution-Based Benefit Cap, S.L. 2014-88, § 1, 2014 N.C. Sess. Laws 291, which is codified, in pertinent part, at N.C.G.S. § 135-5(a3). The Act establishes a retirement benefit cap applicable to certain employees with an average final compensation of $100,000 or more per year whose retirement benefit payment would otherwise be significantly greater than the contributions made by that retiree during the course of his or her employment with the State. *Id.* In order to calculate the benefit cap applicable to each retiree, the Act directs the Retirement System's Board of Trustees to "adopt a contribution-based benefit cap factor recommended by the actuary, based upon

1. At the time that the Board of Education initiated this proceeding, Janet Cowell served as State Treasurer. As a result of the fact that he became State Treasurer on 1 January 2017, Mr. Folwell was substituted as a named respondent in lieu of Ms. Cowell.

2. Mr. Toole was replaced as the executive director of the Retirement Systems Division by Interim Executive Director Thomas G. Causey in May 2019. Pursuant to N.C. R. App. P. 38(c), Mr. Causey is automatically substituted as a respondent for Mr. Toole. However, consistent with the custom of this Court, under which the caption of the case as it appeared in the trial court is deemed controlling, we continue to list Mr. Toole as a party-respondent.

actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped" and to calculate the contribution-based benefit cap for each retiring employee by converting the employee's total contributions to the Retirement System to a single life annuity and multiplying the cost of such an annuity by the cap factor. *Id.* In the event that the retiree's expected pension benefit exceeds the calculated contribution-based benefit cap, the Retirement System is required to "notify the [retiree] and the [retiree's] employer of the total additional amount the [retiree] would need to contribute in order to make the [retiree] not subject to the contribution-based benefit cap." N.C.G.S. § 135-4(jj) (2019). At that point, the retiree is afforded ninety days from the date upon which he or she received notice of the additional payment amount or the date of his or her retirement, "whichever is later, to submit a lump sum payment to the annuity savings fund in order for the [R]etirement [S]ystem to restore the retirement allowance to the uncapped amount." *Id.* The retiree's employer is entitled to "pay[ ] all or part of the . . . amount necessary to restore the [retiree's] retirement allowance to the pre-cap amount." *Id.*

According to N.C.G.S. § 135-6(*l*), "[t]he Board of Trustees shall designate an actuary who shall be the technical adviser of the Board of Trustees on matters regarding the operation of the funds created by the provisions of this Chapter." N.C.G.S. § 135-6(*l*) provides that "all the assumptions used by the [Retirement] System's actuary, including mortality tables, interest rates, annuity factors, and employer contribution rates, shall be set out in the actuary's periodic reports or other materials provided to the Board of Trustees," with the materials to be "accepted by the Board [of Trustees]," N.C.G.S. § 135-6(*l*), and adopted by the Board of Trustees by means of an informal board resolution memorialized in its minutes pursuant to the Administrative Code. *See* 20 N.C. Admin. Code 2B.0202(a) (1981) (stating that "[a]ctuarial tables and assumptions will be adopted by the [B]oard of [T]rustees after the presentation of the recommendations of the actuary by including the tables, rates, etc. in the minutes of the [B]oard [of Trustees] with the resolution adopting said tables, rates or assumptions").

The Board of Trustees hired Larry Langer and Michael Ribble of Buck Consultants to serve as the "[c]onsulting [a]ctuary." At a meeting held by the Board of Trustees on 23 October 2014, Mr. Langer and Mr. Ribble presented certain calculations and assumptions, including summaries of expected retirement patterns, based upon a 2012 valuation of the Retirement System's assets and liabilities. The actuary then recommended a cap factor of 4.8, which the Board of Trustees unanimously approved.

Prior to his retirement on 1 May 2015, Dr. Barry Shepherd served as the superintendent of Cabarrus County Schools. In light of his employment history, Dr. Shepherd was eligible to receive benefits from the Retirement System. At the time of his retirement, the Retirement System determined that Dr. Shepherd's pension benefits were subject to the contribution-based benefit cap and informed both Dr. Shepherd and the Board of Education that an additional contribution to the Retirement System in the amount of $208,405.81 would be required in order for Dr. Shepherd to receive the full retirement benefit to which he would have otherwise been entitled. Upon receiving this information, the Board of Education submitted the required amount on Dr. Shepherd's behalf.

On 18 October 2016, the Board of Education filed a request for a declaratory ruling asking that the invoice and the cap factor used to calculate the amount shown on the invoice be declared "void and of no effect because the [Board of Trustees] did not follow the rule making procedures of . . . the Administrative Procedure Act." According to the Board of Education, the cap factor was "not an actuarial assumption under 20 N.C. Admin. Code 02B.0202" and was not, for that reason, "exempt from the rule making procedures of the [Administrative Procedure Act]." On 17 November 2016, Mr. Toole denied the Board of Education's request on the grounds that the Board of Trustees "ha[d] statutory authority to adopt various recommendations of its actuary" and that its "adoption of a cap factor for the contribution-based benefit cap . . . based upon the recommendations of its actuary, [was] not void."

On 16 December 2016, the Board of Education filed a petition for judicial review in the Superior Court, Cabarrus County, in which it sought a declaratory ruling that (1) "the cap factor is a rule within the meaning of [N.C.]G.S. [§] 150B-2(8a) and that it may be adopted by the . . . Board of Trustees and implemented by the Retirement System [ ] . . . only by complying with the rule making procedures of Article 2A of the [Administrative Procedure Act]"; that (2) "the cap factor adopted by the . . . Board of Trustees . . . is void and of no effect because of the failure of the [Board of T]rustees to follow the rule making procedures of Article 2A of the [Administrative Procedure Act]"; that (3) "the respondents may not implement [N.C.]G.S. [§] 135-5(a3) until a cap factor is adopted in compliance with the rule making procedures of Article 2A of the [Administrative Procedure Act]"; and that (4) "the Retirement System['s] . . . assessment of $208,405.81 against [the Board of Education] is void because of the failure of respondents to adopt a cap factor lawfully." This case was subsequently transferred to the Superior Court, Wake County, by consent of the parties.

On 25 April 2017, the Board of Education moved for summary judgment in its favor. On 30 May 2017, the trial court entered an order granting summary judgment in favor of the Board of Education on the grounds that (1) "[t]he Board of Trustees' adoption of the cap factor in [N.C.]G.S. [§] 135-5(a3) is subject to rule making under the [Administrative Procedure Act]"; (2) "respondents' denial of petitioner's [r]equest for a [d]eclaratory [r]uling was in error as a matter of law"; and (3) "[t]he substantial rights of petitioner have been prejudiced by the respondents' decision." As a result, the trial court determined that the Board of Education was "entitled to have this Court declare that the Board of Trustees' adoption of the cap factor on October 23, 2014, and adoption of the new factor on October 22, 2015, are void and of no effect."[3] Respondents noted an appeal to the Court of Appeals from the trial court's order.

In seeking relief from the trial court's order before the Court of Appeals, respondents argued that the General Assembly had intended that the cap factor be adopted by the Board of Trustees by resolution, rather than by the use of Administrative Procedure Act-complaint rulemaking procedures. Respondents argued that the General Assembly had expressly delineated the functions that required the use of rulemaking procedures in Article 1, Chapter 135 of the General Statutes and that the list of functions contained in that chapter did not include the adoption of actuarial recommendations. In addition, respondents contended that the Administrative Procedure Act did not override the statutory provisions governing the operation of the Retirement System, which spell out specific administrative procedures that must be used in connection with the adoption of actuarial recommendations. Finally, respondents argued that the trial court had erred by failing to defer to the Retirement System's interpretation of the relevant statutory provisions and that the Retirement System had traditionally interpreted the relevant statutory provisions to allow for the adoption and approval of actuarial tables, rates, and assumptions by means of resolutions adopted by the Board of Trustees rather than through the promulgation of an Administrative Procedure Act-compliant rule.

In affirming the trial court's order, the Court of Appeals began by noting that respondents had not challenged the trial court's conclusion

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3. At a meeting held on 22 October 2015, the Board of Trustees discussed the establishment of a new cap factor. At that meeting, Mr. Langer and Mr. Ribble presented updated actuarial data. Based upon this data, the actuary proposed new assumptions and recommended a range of cap factors from 4.2 to 4.8. At the conclusion of the actuary's presentation, the Board of Trustees unanimously adopted a new cap factor of 4.5.

that "[t]he cap factor meets the [Administrative Procedure Act's] definition of a rule in that it is a regulation or standard adopted by the Board [of Trustees] . . . to implement [N.C.]G.S. [§] 135-5(a3)" and that respondents had, instead, argued that "[t]he General Assembly has distinguished functions that require rule[ ]making from functions that do not" and intended to exempt the cap factor determination from the coverage of the rulemaking provisions of the Administrative Procedure Act "by implication." *Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer*, 821 S.E.2d 196, 201 (N.C. Ct. App. 2018). The Court of Appeals rejected this aspect of respondents' position on the grounds that the General Assembly had not explicitly exempted the operations of the Board of Trustees or the adoption of the cap factor from the rulemaking provisions of the Administrative Procedure Act, as it had done with respect to various other agencies and administrative actions in N.C.G.S. § 150B-1(c) and (d). *Id.* (citing *Vass v. Board of Trustees*, 324 N.C. 402, 408, 379 S.E.2d 26, 29 (1989) (stating that, "[h]ad the General Assembly intended that [the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan] be excluded from the requirements of the [Administrative Procedure] Act, we must assume that it would have inserted a specific provision in some statute expressly stating this intent" (citing *Lemons v. Old Hickory Council*, 322 N.C. 271, 276–77, 367 S.E.2d 655, 658 (1988))); *N. Buncombe Ass'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 27–28, 394 S.E.2d 462, 465 (1990) (holding that "the trial court lacked subject matter jurisdiction . . . because the plaintiffs failed to exhaust their administrative remedies" under the Administrative Procedure Act given that the Department of Environment, Health, and Natural Resources "is not among those agencies which the [Administrative Procedure Act] specifically exempts from its provisions")).

In addition, the Court of Appeals declined to hold that the General Assembly had implicitly exempted the adoption of the cap factor from the ambit of the rulemaking provisions of the Administrative Procedure Act on the grounds that the only State agency whose operations had been deemed to be entitled to that status was the North Carolina State Bar. *Id.* at 203; *see also Bring v. N.C. State Bar*, 348 N.C. 655, 501 S.E.2d 907 (1998) (holding, by implication, that the rulemaking provisions of the Administrative Procedure Act do not apply to the State Bar); *N.C. State Bar v. Rogers*, 164 N.C. App. 648, 596 S.E.2d 337 (2004) (holding, by implication, that the adjudicatory provisions of the Administrative Procedure Act do not apply to the State Bar). In reaching this conclusion, the Court of Appeals noted that, in *Rogers*, it had "recognized that the General Assembly enacted a distinct, thorough, complete, and

self-contained disciplinary process by which the State Bar—through the [Disciplinary Hearing Commission]—was mandated to initiate and pursue investigations and hearings as required to police and regulate attorney conduct" and that the existence of this complete and self-contained process, which "include[d] procedural rules[,] . . . left no room for application of [Administrative Procedure Act] procedures." *Cabarrus Cty. Bd. of Educ.*, 821 S.E.2d at 205. Similarly, in addressing our decision in *Bring*, the Court of Appeals noted that "the organic statute at issue [in that case] . . . established a rule making procedure completely independent from that contained in the [Administrative Procedure Act,]" making it "clear that the specific rule making provisions enacted for proceedings governed by the State Bar controlled," especially given that the statutory provisions at issue in *Bring* contained "adequate procedural safeguards . . . to assure adherence to the legislative standards" and "a sufficient standard to guide the Board [of Law Examiners]" in exercising its rulemaking authority. *Id.* at 205–06 (quoting *Bring*, 348 N.C. at 659, 501 S.E.2d at 910). In view of the fact that Article 1, Chapter 135 of the General Statutes "includes nothing approaching the level of independent rule making mandated by the General Assembly for the State Bar," the Court of Appeals rejected respondents' contention that the applicability of the rulemaking procedures contained in the Administrative Procedure Act should be determined on a "line-by-line basis . . . by analyzing each individual sentence or clause of a statutory provision." *Id.* at 206 (emphasis omitted).

Furthermore, the Court of Appeals determined that "[t]he requirement that the actuary submit proposed cap factors to the Board [of Trustees] for adoption does not constitute a separate procedure for rule making purposes" sufficient to render the rulemaking provisions of the Administrative Procedure Act inapplicable. *Id.* at 207. Instead, the Court of Appeals concluded that "[t]his requirement merely insures that the cap factor adopted by the Board [of Trustees] is based upon professionally determined assumptions and projections, and that there will be sufficient documentation to satisfy the requirements of Chapter 135, the [Administrative Procedure Act], and the State Budget Act." *Id.* at 207–08. After noting that Article 1, Chapter 135 of the General Statutes does not define the term "adopt" and that the Administrative Procedure Act explicitly defined that term as meaning "to take final action to create, amend, or repeal *a rule*," the Court of Appeals held that "the word 'adopt' in N.C.G.S. § 135-5(a3) has the same meaning" that it does when it is used in the Administrative Procedure Act. *Id.* at 208. The Court of Appeals further held that, "any time the word 'adopt' is used, it expressly and necessarily *requires an associated rule*," citing N.C.G.S.

§ 150B-2(1b) (2017). *Id.* Similarly, after noting that Article 1, Chapter 135 of the General Statutes does not define the term "rule," the Court of Appeals held that "the cap factor falls within the [Administrative Procedure Act's] definition of a 'rule' " and that the General Assembly did not intend to modify or amend the Administrative Procedure Act by implication at the time that it prescribed the procedures to be utilized in connection with the adoption of a cap factor. *Id.*

The Court of Appeals also rejected respondents' related arguments that the Board of Trustees "understood the cap factor to be an actuarial assumption or rate, or that it adopted the cap factor pursuant to the provisions of 20 N.C. Admin. Code 2B.0202," and that the Board of Trustees' interpretation of the relevant statutory provisions to this effect should be given deference. *Id.* at 209 (citing *Wells v. Consol. Judicial Ret. Sys. of N.C.*, 354 N.C. 313, 319, 553 S.E.2d 877, 881 (2001) (stating that "it is ultimately the duty of courts to construe administrative statutes" and that "courts cannot defer that responsibility to the agency charged with administering those statutes" (citing *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 306 S.E.2d 435 (1983))). The Court of Appeals was not persuaded by respondents' arguments that subjecting the adoption of a cap factor to formal rulemaking requirements would result in "unnecessar[y] inefficien[cies]" and serve no useful purpose on the grounds that the Court of Appeals "is not the proper entity to address those arguments" and that the "[w]eighing . . . [of] public policy considerations is in the province of our General Assembly" instead. *Id.* at 209–10 (quoting *Wynn v. United Health Servs./Two Rivers Health-Trent Campus*, 214 N.C. App. 69, 79, 716 S.E.2d 373, 382 (2011)). As a result, for all of these reasons, the Court of Appeals affirmed the trial court's order. On 27 March 2019, this Court allowed respondents' petition for discretionary review of the Court of Appeals' decision.

In seeking to persuade this Court to reverse the Court of Appeals' decision, respondents begin by arguing that the General Assembly had stated in N.C.G.S. § 135-5(a3) that actuarial decisions need not be made through the use of Administrative Procedure Act-compliant rulemaking procedures and that, on the contrary, the Board of Trustees had the authority to follow N.C.G.S. § 135-6(l) in making any required actuarial decisions. In support of this contention, respondents direct our attention to *Bring*, in which the Board of Law Examiners adopted a set of procedures for use in determining the identity of those persons eligible to take the bar examination and a list of law schools that had been approved by the American Bar Association that it presented to the State Bar Council and the Chief Justice for approval in reliance upon N.C.G.S.

§ 84-24 (providing that "[t]he Board of Law Examiners, subject to the approval of the [State Bar] Council shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the [State] Bar as in their judgment shall promote the welfare of the State and the profession") despite the fact that nothing in the relevant statutory provisions explicitly displaced the Administrative Procedure Act. *Bring*, 348 N.C. at 657–60, 501 S.E.2d at 908–10. In determining that the statutorily established procedural requirements contained in Chapter 84 of the General Statutes superseded the rulemaking procedures required by the Administrative Procedure Act, this Court recognized that the Board of Law Examiners was an expert body with specialized knowledge that was better equipped to make decisions concerning the suitability of applicants to take the bar examination than the General Assembly. *Id.* at 659, 501 S.E.2d at 910. Similarly, respondents assert that the actuary in this case provided the Board of Trustees with an analysis of the relevant information and a recommendation pursuant to N.C.G.S. § 135-6(*l*) and that the Board of Trustees had accepted the information and recommendations provided by the actuary, recorded its action in the meeting minutes, and begun implementing the cap factor. As a result, respondents contend that our decision in *Bring* necessitates a conclusion that the Board of Trustees was not required to utilize the rulemaking procedures specified in the Administrative Procedure Act in adopting the cap factor.

Secondly, respondents contend that the Court of Appeals erred by holding that specific procedural statutes, such as N.C.G.S. § 135-6(*l*), only supersede the rulemaking provisions of the Administrative Procedure Act in the event that they "left no room" for the application of those procedures, citing *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012) (stating that, "when two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls" (citing *State ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 193 (1977))), and decisions from federal courts. As additional support for this contention, respondents assert that "the Court of Appeals allowed a generic statute to displace a specialized statute written for a specific kind of agency action" contrary to this Court's decision in *Nat'l Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1966), in which we held that a specific statutory provision governing the sale of alcohol to minors superseded a more generic statutory provision when the two statutory provisions conflicted with each other. According to respondents, requiring the Board of Trustees to disregard N.C.G.S. § 135-6(*l*) in favor of the rulemaking provisions of

the Administrative Procedure Act contravenes the General Assembly's intent, citing *LexisNexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of the Courts*, 368 N.C. 180, 187, 775 S.E.2d 651, 656 (2015), and *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). Respondents argue that "the rationale for applying the more specific statute is particularly strong when that statute was enacted after the generic one," citing *Nat'l Food Stores* (noting that the specific statute at issue in that case had been enacted ten years after the enactment of the general statute), as is the case in this instance given that the present Administrative Procedure Act rulemaking provisions were enacted in 1991, while N.C.G.S. § 135-6(*l*) was enacted in 2012. In addition, respondents contend that, contrary to the Court of Appeals' decision in this case, nothing requires that the specific statute be "distinct, thorough, complete, and self-contained" in order for it to implicitly supersede the Administrative Procedure Act, citing *Hughey v. Cloninger*, 297 N.C. 86, 89–92, 253 S.E.2d 898, 900–02 (1979), and *Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 434 S.E.2d 176 (1993), or that the specific statute be read *in pari materia* with the general statute, citing *High Rock Lake*, 366 N.C. at 320–22, 735 S.E.2d at 304–05. Simply put, respondents claim that the Court of Appeals' decision "cannot be reconciled with this Court's more-specific-statute jurisprudence," citing *High Rock Lake*, *Nat'l Food Stores*, and *Bring*, and that the logic upon which the Court of Appeals relied "would have produced the opposite result in *Bring*."

Furthermore, respondents contend that there is ample evidence indicating that the General Assembly did not intend that the cap factor be established using Administrative Procedure Act-complaint rulemaking procedures. More specifically, respondents note that, while "the legislature explicitly required the [Board of T]rustees to use rulemaking to define how the [R]etirement [S]ystem will report to employers on probable cases of pension spiking[,] . . . the section of the session law that describes setting the cap factor makes no mention of rulemaking." Respondents assert that this "drafting pattern[,] . . . [which] use[s] . . . key words in one place but not elsewhere[,] bars an interpretation that injects the key words where the legislature has omitted them," citing *Fid. Bank v. N.C. Dep't of Rev.*, 370 N.C. 10, 21–22, 803 S.E.2d 142, 150 (2017) and *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987). Respondents argue that, while the use of Administrative Procedure Act-complaint rulemaking makes sense in some circumstances, such as complying with the reporting requirement discussed in N.C.G.S. § 135-8(f)(2)(f), it "offers no value" in the setting of a cap factor, "has no proper role in a process that mandates deference to an expert actuary," and "cannot be a matter of public debate" given

the existence of a statutory requirement that the cap factor be recommended to the Board of Trustees by the actuary based upon actual experience, citing *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 3 (D.C. Cir. 2011) and N.C.G.S. § 135-5(a3). In addition, respondents contend that the lengthy rulemaking process required by the Administrative Procedure Act is incompatible with the relatively short timeline in which the Act had to be implemented—a mere twenty-two weeks pursuant to N.C.G.S. § 135-8(f)(2)(f). According to respondents, "the legislature cannot have intended for the agency" to reach the "nonsensical result" of "miss[ing] the explicit deadlines stated in the law" and, instead, "intended the [R]etirement [S]ystem to act swiftly to address the funding cap caused by pension spiking" by acting in accordance with N.C.G.S. § 135-6(*l*), instead of complying with the rulemaking procedures set out in the Administrative Procedure Act.[4]

Respondents cite *Lunsford*, 367 N.C. at 623, 766 S.E.2d at 301, in support of their argument that, when viewed "as a whole[,] . . . [t]hose statutes confirm that the legislature has consciously chosen to exclude actuarial recommendations from the [Administrative Procedure Act's] rulemaking requirements." According to respondents, twenty-six statutory provisions, including all fourteen of the provisions relating to actuarial matters, simply state that the Board of Trustees must merely "adopt" or "establish" certain measures without making any mention of the obligation to utilize Administrative Procedure Act-complaint rulemaking. In addition, respondents note that ten of the twelve provisions that deal with non-actuarial matters explicitly require the use of Administrative Procedure Act-complaint rulemaking.

Finally, respondents contend that "[t]he cases cited by the Court of Appeals do not hold that the [Administrative Procedure Act's] general rulemaking procedures override specific procedures in an agency statute." According to respondents, this case is distinguishable from *Vass* given that that case was decided at a time when the Administrative Procedure Act "appl[ied] to every agency . . . except to the extent and in the particulars that any statute . . . makes specific provisions to the contrary[,]" *see* N.C.G.S. § 150B-1(c) (1987), formerly codified as N.C.G.S. § 150A-1(a), which respondents describe as an "exclusivity requirement for rulemaking[,]" with this language having been deleted in 1991 and with the "current [version of the Administrative Procedure

4. Respondents note that, when the Board of Trustees later adopted a cap factor utilizing the Administrative Procedure Act's rulemaking procedures, it took the agency 364 days to do so.

Act] impos[ing] no parallel exclusivity provision for rulemaking." In addition, respondents distinguish this case from *Empire Power Co. v. N.C. Dep't of Env't, Health and Nat. Res.*, 337 N.C. 569, 447 S.E.2d 768 (1994) (holding that, in the event that an agency-specific statute and the Administrative Procedure Act can be read *in pari materia*, the Court "must give effect to both if possible"), which, in respondents' view, dealt exclusively with contested case provisions that are not at issue in this case and that "continue to be subject to the mandate that exemptions from the [Administrative Procedure Act] be express," citing N.C.G.S. § 150B-1(e). As a result, respondents argue that both *Empire Power* and *Bring* indicate that, "where the same question is answered by both the agency statute and the [Administrative Procedure Act], . . . the more-specific statute applies."

In seeking to persuade us to uphold the Court of Appeals' decision, the Board of Education argues that an exemption from the rulemaking provisions of the Administrative Procedure Act only exists in the event that the clear and unambiguous statutory language requires such a result. According to the Board of Education, the General Assembly explicitly created such an exemption for certain enumerated agencies, such as the North Carolina Utilities Commission, and for certain enumerated administrative actions, such as executions conducted by the North Carolina Department of Public Safety. The Board of Education asserts that the General Assembly's failure to explicitly exempt the Retirement System from the rulemaking requirements of the Administrative Procedure Act is sufficient to establish the non-existence of such an exemption, citing Vass. In addition, the Board of Education denies that any implied exemption from the rulemaking provisions of the Administrative Procedure Act exists in this situation. Although several attempts have been made in the General Assembly to obtain the enactment of legislation exempting the establishment of a cap factor from the rulemaking provisions contained in the Administrative Procedure Act, none of those efforts have been successful. Moreover, the existence of such proposed legislation shows that, in the event that the General Assembly wished to exempt the process of establishing a cap factor from the rulemaking provisions of the Administrative Procedure Act, it knows how to do so.

The Board of Education asserts that the facts of this case are distinguishable from those at issue in *Bring* and *Rogers*. According to the Board of Education, both *Bring* and *Rogers* recognize that the General Assembly had enacted a comprehensive set of statutes governing the operations of the State Bar that were clearly intended to supersede the relevant provisions of the Administrative Procedure Act. On the other

hand, the Board of Education contends that the same cannot be said for the statutes at issue in this case so that respondents are, in this instance, "asking the [C]ourt . . . to conjure an exemption out of vague statutes and a history that contradicts their explanation."

In the Board of Education's view, the legal principle that a specific statute does not supersede the provisions of the Administrative Procedure Act unless it leaves "no room for application of [Administrative Procedure Act-compliant rulemaking] procedures" does not represent the adoption of a new, more stringent legal standard; instead, the language to this effect utilized by the Court of Appeals is "simply a description of the facts in the *Rogers* case." Similarly, the Board of Education contends that respondents have mischaracterized this Court's decision in *Empire Power*, which, in its view, clearly indicates that the goal of the 1991 amendments to the Administrative Procedure Act, instead of "leav[ing] room for more exemptions," was "to further uniformity" in administrative rulemaking in accordance with the Administrative Procedure Act and to reduce the number of exempt agencies.

The Board of Education argues that, contrary to respondents' assertions, N.C.G.S. § 135-6(*l*) "does not address rulemaking" and "includes no specific provision at all comparable to what the [C]ourt considered in *Empire Power*." In addition, the Board of Education notes that respondents have not identified any "retirement statute that offers the same kind of explicit conflict with the [Administrative Procedure Act] as in *Empire Power*." The Board of Education points out that, prior to the initiation of this proceeding, respondents had not treated statutes requiring the Board of Trustees to "adopt" certain measures—including the statute at issue in this case—differently from statutes requiring the Board of Trustees to "adopt a rule" in order to address certain issues and asserts that "[i]t defies credibility for [respondents] to now argue that [they] understood all along a difference based on the use of 'adopt a rule' rather than 'adopt.' " The Board of Education cites a number of retirement statutes that make reference to rulemaking even though the Board of Trustees has never adopted the rules called for by those statutory provisions. On the other hand, the Board of Education cites statutes which would not, in respondents' view, require the use of the rulemaking procedures pursuant to the Administrative Procedure Act, in which rules have been adopted. As a result, the Board of Education contends that respondents have failed to distinguish between statutory provisions requiring them to "adopt" or "adopt a rule" in a meaningfully consistent manner.

According to the Board of Education, the fact that a cap factor must be based upon the actuary's recommendation does not compel a determination that the decision to establish a particular cap factor is controlled by N.C.G.S. § 135-6(*l*) or renders the rulemaking provisions of the Administrative Procedure Act inapplicable. In the Board of Education's view, "[w]hile the cap factor chosen by the Board of Trustees must be based on actuarial assumptions, it is not an actuarial assumption itself." On the contrary, the Board of Education describes the adoption of a cap factor as a "discretionary decision that results from consideration of the actuarial assumptions presented by the [R]etirement [S]ystem's actuary" and states that "[N.C.]G.S. [§] 135-6(*l*) requires the . . . [Board of T]rustees to include actuarial assumptions in the state retirement plan to satisfy the [Internal Revenue Service's] requirement that the employer not be able to alter the defined benefits to retirees." In essence, the Board of Education asserts that a cap factor "is of a different character than the tables, rates, and assumptions" governed by the Board of Trustees' rule concerning actuarial assumptions, citing 20 N.C. Admin. Code 2B.0202, and that the record is devoid of any indication that the Board of Trustees "ever considered the cap factor to be an actuarial assumption." As a result, the Board of Education argues that the mere fact that the actuary makes a recommendation concerning the cap factor to the Board of Trustees does not exempt the Retirement System from the rulemaking requirements of the Administrative Procedure Act, with "[t]here [being] nothing remarkable . . . about the use of such expertise in rulemaking."

The Board of Education contends that the Board of Trustees could have satisfied the five-month time frame within which it was required to establish a cap factor by adopting a temporary rule pursuant to N.C.G.S. § 150B-21.1. Although the statutory deadline for setting the cap factor was 1 January 2015, the Board of Education notes that no rulemaking proceeding was initiated until December 2017 and that no cap factor rule became effective until 21 March 2019. Even so, the Board of Education points out that the Retirement System sent numerous notices to the employers of affected retirees for the purpose of "seeking additional contributions . . . for retirements that occurred well before 21 March 2019," including the notice sent in this case, and that, when employers objected to the resulting invoices, the Retirement System "replied that it consider[ed] the new rule applicable to all retirements since 1 January 2015." For that reason, the Board of Education asserts that "[i]t would seem . . . that the [R]etirement [S]ystem [did] not really believe the 1 January 2015 effective date of the pension cap law established a deadline for rulemaking that could not be met."

Finally, the Board of Education contends that the significant public interests at stake in the establishment of the cap factor make it "exactly the kind of important administrative decision that should go through rulemaking." In support of this assertion, the Board of Education directs our attention to the "devastating sums of money" that school systems have been billed following the retirement of eligible employees, which the Board of Education describes as "liabilities the school boards were powerless to avoid" given that "the pension cap law applied to contracts and compensation decisions that had been entered [into] years before and that could not have been changed in response to the new law." In addition, the Board of Education notes that, when the Board of Trustees proposes a rule that will have a "substantial economic impact," which any rule prescribing a cap factor will necessarily have, the Administrative Procedure Act requires the agency to consider at least two alternatives and perform a fiscal analysis. *See* N.C.G.S. § 150B-19.1(f). According to the Board of Education, the use of the rulemaking procedures required by the Administrative Procedure Act would have the effect of "remind[ing the Board of Trustees] that the school board has no taxing authority," that the Board of Trustees would learn that local boards of education "would have to seek additional funding from the county commissioners," and that the Board of Trustees would be informed about "the number of teaching positions likely to be lost, the huge hole that would be created in capital funding, and the other consequences of their rulemaking" through the use of Administrative Procedure Act-compliant rulemaking to establish the cap factor.

According to well-established North Carolina law, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). An appellate court reviews a trial court's decision to grant or deny a motion for summary judgment de novo. *Meinck v. City of Gastonia*, 371 N.C. 497, 502, 819 S.E.2d 353, 357 (2018). We will now resolve the issue that has been presented for our consideration in this case in light of the applicable standard of review.

The sole issue for our consideration in this case is whether the General Assembly intended to relieve the Board of Trustees from the necessity for compliance with the rulemaking provisions contained in the Administrative Procedure Act in adopting a cap factor pursuant to N.C.G.S. § 135-5(a3). In view of the fact that respondents have not denied that the establishment of a cap factor falls within the scope of

the Administrative Procedure Act's definition of a "rule" and the fact that respondents acknowledge that the Board of Trustees is not explicitly exempt from the Administrative Procedure Act, the ultimate issue before us in this case is whether the establishment of a cap factor is implicitly exempt from the Administrative Procedure Act's rulemaking provisions. A careful analysis of our prior decisions concerning the extent to which particular agencies or decisions are deemed to be implicitly exempt from the necessity for compliance with the provisions of the Administrative Procedure Act makes it clear that such implicit exemptions are very much the exception, rather than the rule, and should only be recognized in the event that it is abundantly clear that the General Assembly intended such a result.

This Court's decision in *Empire Power* stemmed from a challenge by a property owner to a state agency's decision to award an air emissions permit to a utility company. *Empire Power Co.*, 337 N.C. at 574, 447 S.E.2d at 771–72. The property owner alleged that he would suffer injury to his health by virtue of the emissions that would result from the issuance of the permit. *Id.* The state agency contended, and the Court of Appeals agreed, that, pursuant to N.C.G.S. § 143-215.108(e), the right to challenge such permitting decisions was limited to the applicant. *Id.* at 573–74, 447 S.E.2d at 771. In considering whether the "organic statute amends, repeals, or makes an exception to the [Administrative Procedure Act,] so as to exclude [the property owner] from those entitled to" challenge the agency's permitting decision, we noted that (1) "the primary function of a court is to ensure that the purpose of the [l]egislature in enacting the law . . . is accomplished"; (2) "statutes *in pari materia*, and all parts thereof, should be construed together" and "reconciled with each other when possible"; and (3) "any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent." *Id.* at 591, 447 S.E.2d at 781 (quoting *Comm'r of Ins. v. Rate Bureau*, 300 N.C. 381, 399–400, 269 S.E.2d 547, 561 (1980) (citation omitted), *overruled on other grounds by In re Redmond*, 369 N.C. 490, 497, 797 S.E.2d 275, 280 (2017)). In addition, we stated that "implied amendments cannot arise merely out of supposed legislative intent in no way expressed, however necessary or proper it may seem to be," and that "[a]n intent to amend a statute will not be imputed to the legislature unless such intention is manifestly clear from the context of the legislation." *Id.* at 591, 447 S.E.2d at 781 (quoting *In re Halifax Paper Co.*, 259 N.C. 589, 594, 131 S.E.2d 441, 445 (1963)). We also held that an implied exemption to the relevant statutory provision will only be recognized "where the terms of a later statute are so repugnant to an earlier statute that they cannot stand together." *Id.* As long as there is "a fair and

reasonable construction of the organic statute that harmonizes it with the provisions of the [Administrative Procedure Act,] . . . it is our duty to adopt that construction." *Id.* at 593, 447 S.E.2d at 782 (citing *In re Miller*, 243 N.C. 509, 514, 91 S.E.2d 241, 245 (1956)). In view of the fact that the General Assembly "ha[d] not expressed or otherwise made manifestly clear an intent to [supplant the Administrative Procedure Act]" in the "organic" statute at issue in *Empire Power* and the fact that there was not "such repugnancy between the statutes [at issue in that case] as to create an implication of amendment or repeal 'to which we can consistently give effect under the rules of construction of statutes,' " we declined to recognize the existence of an implied exemption from the judicial review provisions of the Administrative Procedure Act sufficient to bar the landowner from seeking review of the challenged agency action. *Id.*

Similarly, *Bring* involved a challenge by an individual who had graduated from a law school that had not been approved for accreditation pursuant to N.C.G.S. § 84-24. In rejecting the individual's argument that the Board of Law Examiners was not required to have identified the law schools whose graduates were eligible to take the North Carolina bar examination, we stated, without further elaboration, that N.C.G.S. § 84-21 "[gave] specific directions as to how the Board [of Law Examiners] should adopt rules." *Id.* at 660, 501 S.E.2d at 910. As a result, we held that the existence of a specific statute prescribing the manner in which the Board of Law Examiners was required to adopt rules sufficed to render the rulemaking provisions of the Administrative Procedure Act inapplicable. *Id.* at 659, 501 S.E.2d at 910.

In *Vass*, an individual insured under a state medical plan filed an unsuccessful claim seeking the recovery of costs associated with laser vision correction surgery. *Vass*, 324 N.C. at 403–04, 379 S.E.2d at 27. Although the individual appealed to the medical plan's Board of Trustees, that body rejected his appeal on the grounds that the surgical procedure in question was not covered pursuant to N.C.G.S. § 135-40.6(6)(h) at that time. *Id.* In determining whether the individual's ability to seek further review of the Board of Trustees' decision was limited by N.C.G.S. § 135-39.7, which provided that the Board of Trustees had the authority to "make a binding decision on the matter in accordance with procedures established by the Executive Administrator and Board of Trustees," we noted that, at the time, the Administrative Procedure Act "clearly indicate[d]" that it "shall apply to every agency of the executive branch of State government, except to the extent and in the particulars that any statute 'makes *specific* provisions to the contrary,' " *id.* at 406, 379 S.E.2d

at 28 (quoting N.C.G.S. § 150B-1(c) (1987), previously codified as N.C.G.S. § 150A-1(a)), and that "[i]t is clear that the General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act's requirements," with even such specific exemptions to "apply only to the extent specified by the General Assembly." *Id.* at 407, 379 S.E.2d at 29. In considering whether N.C.G.S. § 135-39.7 exempted the Board of Trustees' decision from further review pursuant to the Administrative Procedure Act, we noted that "the General Assembly has shown itself to be quite capable of specifically and expressly naming the particular agencies to be exempt from the provisions of the Act" and that the Board of Trustees had never "been expressly exempted from the Act's requirements." *Id.* As a result, "we conclude[d] that the [Board of Trustees'] decisions [were] subject to administrative review under the [Administrative Procedure Act]," stating that, "[h]ad the General Assembly intended that the [Board of Trustees] be excluded from the requirements of the [Administrative Procedure Act], we must assume that it would have inserted a specific provision in some statute expressly stating this intent." *Id.* at 407–08, 379 S.E.2d at 29 (citation omitted).

A collective analysis of these decisions, which encompass a range of different issues and varying present and now-repealed statutory provisions, demonstrates that this Court has consistently refused to recognize the existence of any implicit exemption from the provisions of the Administrative Procedure Act in the absence of a clearly-stated legislative intent to the contrary. A presumption that the rulemaking provisions of the Administrative Procedure Act apply to the formulation of rules, as that term is defined in N.C.G.S. § 150B-2(8a), in the absence of an explicit or implicit exemption, is fully consistent with the applicable statutory provisions and represents the most logical reading of them. *See* N.C.G.S. § 150B-1(a) (providing that "[t]his Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies"); N.C.G.S. § 150B-18 (providing that "[t]his Article applies to an agency's exercise of its authority to adopt a rule[,]" with "[a] rule [not being] valid unless it is adopted in substantial compliance with this Article"). For the following reasons, we are not persuaded that the General Assembly, in enacting the anti-pension-spiking legislation that is at issue in this case, intended to implicitly exempt the Board of Trustees from complying with the rulemaking provisions of the Administrative Procedure Act when establishing a cap factor.

As an initial matter, we are unable to conclude that N.C.G.S. § 135-5(a3) and N.C.G.S. § 135-6(*l*) are "so repugnant to [the Administrative Procedure

Act] that they cannot stand together." *Empire Power Co.*, 337 N.C. at 591, 447 S.E.2d at 781 (quoting *In re Halifax Paper Co.*, 259 N.C. at 594, 131 S.E.2d at 445). On the contrary, we have no difficulty in concluding that the relevant statutory provisions can be harmonized with the rulemaking requirements of the Administrative Procedure Act with relative ease. Simply put, we do not see anything in N.C.G.S. § 135-5(a3) or N.C.G.S. § 135-6(*l*) that suggests that the General Assembly intended to dispense with the necessity for compliance with the relevant provisions of the Administrative Procedure Act in establishing a cap factor.

A careful analysis of the relevant statutory provisions makes it clear that the adoption of a cap factor is not a ministerial act in which the Board of Trustees does nothing more than ratify the actuary's recommendation. According to N.C.G.S. § 135-5(a3), the Board of Trustees is required to "adopt a contribution-based benefit cap factor recommended by the actuary, based upon actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped." Although the remaining provisions of N.C.G.S. § 135-5(a3) prescribe, in considerable detail, what use is to be made of the cap factor once it has been adopted, the relevant statutory provisions do not prescribe any additional procedural steps that must be taken in connection with the adoption of the cap factor. In view of the fact that the actuary serves as "the technical adviser of the Board of Trustees on matters regarding the operation of the funds created by the provisions of this Chapter" and the fact that the cap factor is a substantive decision to be made by the Board of Trustees, rather than an "assumption[ ] used by the [Retirement System's] actuary," N.C.G.S. § 135-6(*l*), we are not persuaded that the cap factor is an actuarial assumption or that the Board of Trustees is required to simply rubber stamp the actuary's cap factor recommendation.[5] On the contrary, as is evidenced by the fact that the adopted cap factor cannot result in more than "three-quarters of one percent (0.75%) of retirement allowances being capped," N.C.G.S. § 135-5(a3), it is clear that the Board does, in fact, have a degree of discretion in determining an appropriate cap factor within the confines of the stated statutory parameters. In addition, the fact that an actuary must

5. Although the interpretation of the relevant statutory language adopted by an administrative agency is entitled to "great weight," *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citing *High Rock Lake Ass'n v. N.C. Envtl. Mgmt. Comm'n*, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981)), we are not persuaded by respondents' interpretation of the relevant statutory provisions or satisfied that such a rule of construction has substantial bearing in situations in which an agency is seeking to avoid the constraints that would otherwise be imposed by the Administrative Procedure Act.

be involved in the process of establishing the cap factor does not suffice to provide affected persons with the sort of procedural protections that are inherent in Administrative Procedure Act-compliant rulemaking proceedings, obviate the importance of public input into the adoption of a cap factor, or reduce the importance of the additional analytical steps that administrative agencies must take in making decisions of the apparent magnitude of this one. *See*, *e.g.*, N.C.G.S. § 150B-21.4(b1)–(b2) (requiring that, where the aggregate financial impact of an administrative agency decision upon all affected persons exceeds $1 million during a twelve-month period, the agency must generate a fiscal note describing, among other things, "at least two alternatives to the proposed rule that were considered by the agency and the reason the alternatives were rejected")[6]. As a result, we conclude that the procedural requirements detailed in N.C.G.S. § 135-5(a3) and N.C.G.S. § 135-6(*l*), are not, unlike those at issue in *Bring*, sufficiently detailed to suggest that the General Assembly intended for the establishment of the cap factor to be implicitly exempt from the rulemaking provisions of the Administrative Procedure Act and we believe, instead, that the relevant statutory language contemplates that the cap factor will be established in a manner similar to that required when other administrative agencies are required to make discretionary decisions that are informed by agency staff expertise, as is the case with many, if not virtually all, administrative decisions.[7]

Although respondents suggest that the fact that the relevant statutory provisions use the term "adopt," rather than the expression "adopt a rule," indicates the existence of a clear distinction between circumstances in which Administrative Procedure Act-compliant rulemaking is required and those in which it is not, we conclude that this

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6. The fact that N.C.G.S. § 135-5(a3) prohibits the Board of Trustees from adopting a cap factor that results in more than "three-quarters of one percent (0.75%) of retirement allowances being capped" necessarily means that a range of cap factors are statutorily permissible, making it perfectly sensible for the agency to be required to consider multiple alternatives.

7. The descriptions of the cap factor decisions actually made by the Board of Trustees are fully consistent with the understanding set out in the text of this opinion. For example, at the time that the initial cap factor was established in 2014, the actuary, after recommending the adoption of a 4.8 cap factor, stated that, "[f]or the reasons previously stated, the Board [of Trustees] may consider a more conservative factor[.]" Similarly, at the time that the Board of Trustees established a new cap factor in the following year, the actuary stated that "the Board [of Trustees] may consider decreasing the factor[,]" that "the current factor [for the Teachers' and State Employees' Retirement System] is 4.8[,]" and that "the minimum allowable factor is 4.2[.]" As a result, the establishment of a cap factor does, in fact, involve the making of a discretionary decision that allows for the consideration of information other than purely actuarial considerations.

argument rests upon an exceedingly nuanced semantic distinction that does not appear to reflect the Board's actual practice. In addition, we are not persuaded that the distinction that respondents seek to draw between provisions couched in terms of "adopt," rather than "adopt a rule," is sufficient to overcome the presumption against the recognition of implicit exemptions from the requirements of the Administrative Procedure Act that is inherent in the relevant statutory provisions and this Court's practice of reading allegedly conflicting statutes in harmony whenever it is possible to do so. *Id.* at 593, 447 S.E.2d at 782 (citing *In re Halifax Paper Co.*, 259 N.C. at 595, 131 S.E.2d at 445; and *In re Miller*, 243 N.C. at 514, 91 S.E.2d at 245).

In addition, we are not convinced that the prior decisions of this Court upon which respondents rely provide significant support for the decision that they ask us to make. For example, we are not persuaded that our decision in *Fidelity Bank*, in which we held that an undefined term in the relevant statutory provision should be interpreted in accordance with its plain meaning and that, in the event that the General Assembly intended for the term in question to be used in a certain manner, it could have included such a definition in the relevant legislation, *see Fid. Bank*, 370 N.C. at 20, 803 S.E.2d at 149, provides any support for respondents' position given that respondents give the term "adopt" a somewhat technical meaning that lacks support in the remaining statutory language. In addition, our decision in *High Rock Lake Partners, LLC*, 366 N.C. at 322, 735 S.E.2d at 305, which rests upon the fact that the relevant statutory language was "clear and unambiguous," is of little moment in this case, given our belief that the relevant statutory provisions clearly do not exempt the establishment of the cap factor from the rulemaking provisions of the Administrative Procedure Act.

Similarly, our decision in *Hughey*, 297 N.C. at 92, 253 S.E.2d at 902, in which we held that a specific statute allowing the State Board of Education to disburse funds to severely learning disabled children superseded a more general statutory provision allowing county commissioners to disburse funds to the "physically or mentally handicapped," does not support respondents' position given that *Hughey* rested, at least in part, upon the fact that "the General Assembly has consistently delegated specific responsibility for the special education of learning disabled children to the State and local boards of education." Nothing in the present record suggests that the General Assembly has consistently exempted decisions by the Board of Trustees of a similar magnitude as the establishment of the cap factor from the rulemaking provisions of the Administrative Procedure Act.

In *Nat'l Food Stores*, which involved statutes governing the sale of alcohol to minors, our determination that a specific statute must be given effect over a more general statute hinged upon the fact that the relevant statutes directly conflicted with each other, with the specific statute requiring that the seller know that the buyer was a minor while the general statute contained no such knowledge requirement. 268 N.C. at 629, 151 S.E.2d at 586. In the same vein, we held in *Piedmont Publ'g Co.* that a specific statute prevailed over a general statute because any attempt to read the two in harmony with each other would produce an "illogical" result. 334 N.C. at 597, 434 S.E.2d at 177. For the reasons set forth in more detail above we do not see the sort of conflict present in these decisions in analyzing the rulemaking provisions of the Administrative Procedure Act, on the one hand, and N.C.G.S. § 135-5(a3) and N.C.G.S. § 6(*l*), on the other.

Finally, unlike the situation at issue in *Bring*, the statutory provisions upon which respondents rely in support of their argument for an implicit exemption lack the sort of substantive and procedural safeguards that are present in the rulemaking provisions of the Administrative Procedure Act. 348 N.C. at 659, 501 S.E.2d at 910. Instead, N.C.G.S. § 135-5(3a) and N.C.G.S. § 135-6(*l*) are devoid of the sort of procedural detail that persuaded us to recognize an implicit exemption from the rulemaking provisions of the Administrative Procedure Act in *Bring*. As a result, we are not persuaded by respondents' arguments in reliance upon our precedents.

Finally, we agree with the Board of Education that the public interests at stake in this case support, rather than undercut, the Board of Education's contention that the cap factor should be established by using the rulemaking provisions of the Administrative Procedure Act, which ensure the opportunity for adequate public input before a decision becomes final. As we have already demonstrated, the relevant statutory language clearly indicates that the establishment of a cap factor is a discretionary decision that must be made by the Board of Trustees, with the aid of an actuary, rather than a ministerial decision over which the Board of Trustees has little to no control. Moreover, as the Board of Education correctly notes, the relatively tight deadline within which the Board of Trustees was required to adopt an initial cap factor is entitled to very little weight in our analysis given that the Administrative Procedure Act allows for the adoption of temporary rules in the event that an agency is required to act while subject to significant time constraints. *See* N.C.G.S. § 150B-21.1(a)(2) (stating that "[a]n agency may adopt a temporary rule when it finds that adherence to the notice and

hearing requirements of [N.C.]G.S. [§] 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by . . . [t]he effective date of a recent act of the General Assembly"). Lastly, while the General Assembly is, of course, the ultimate arbiter of whether the adoption of a cap factor is implicitly exempt from the rulemaking provisions spelled out in the Administrative Procedure Act, the relevant statutory language, read in light of this Court's decisions construing the language of other statutes to determine if they supplanted the requirements of the Administrative Procedure Act, satisfies us that the General Assembly did not intend such a result. Thus, for all of these reasons, we agree with the Court of Appeals that the Board of Trustees was required to adopt the statutorily mandated cap factor utilizing the rulemaking procedures required by the Administrative Procedure Act and that the Retirement System erred by billing the Cabarrus County Board of Education an additional amount relating to Dr. Shepherd's pension, in light of the Board of Trustees' failure to adopt the necessary cap factor in an appropriate manner. As a result, the Court of Appeals' decision in this case is affirmed.[8]

AFFIRMED.

Justice NEWBY dissenting.

In 2014 the General Assembly addressed an imminent threat to the solvency of the entire State Retirement System: pension spiking. When it passed the pertinent anti-pension spiking provision, it required the Board of Trustees of the State Retirement System (the Board) to adopt a "cap factor" recommended by an actuary, and specifically described the procedures the Board must follow. That law was enacted against the backdrop that, since at least 1981, the Board has adopted actuarial recommendations by resolution. The Board expeditiously proceeded according to this process. Now the majority creates a five-year gap in this law's enforcement by holding that the procedures under the Administrative Procedure Act (APA) should apply. If, however, separate statutory provisions specifically describe the relevant agency's procedures, those provisions supersede those of the APA. In this case the General Assembly has given detailed directions to the Board on how to

8. Although the Retirement System ultimately adopted a cap factor using the rulemaking procedures specified in the Administrative Procedure Act, we do not believe that this fact renders this case moot, given that the Board of Education has sought to have the additional amount that it paid to have Dr. Sheppard's pension refunded.

adopt and implement regulations to limit pension spiking. The legislature determined that quick action by the Retirement System was necessary to keep the retirement fund solvent. Because I believe the majority mistakenly requires the Board to submit to the APA's rulemaking procedures when it adopts a cap factor, I respectfully dissent.

The Retirement System is funded by contributions by state employers and employees over the course of the employment. Under state law, a state employee's pension upon retirement is calculated based on the average salary the employee earns during the employee's four highest paying years of employment. It became evident that for a retiree who, for the last four years of employment, earned significantly higher salaries than in previous years, the calculated pension value was strikingly high compared to the amount contributed into the fund on the retiree's behalf. This practice was labeled "pension spiking." Pension spiking usually involves either early retirements or late-career pay raises that inflate the calculated pension amount. In the aggregate, pension spiking creates a dangerous deficit in the state retirement fund.

Seeing this threat to the solvency of the Retirement System, the General Assembly passed a law to limit pension spiking. An Act to Enact Anti-Pension-Spiking Legislation by Establishing a Contribution-Based Benefit Cap, S.L. 2014-88, § 1, 2014 N.C. Sess. Laws 291, 291–94. Under this law, which applies only to retirees who earned at least $100,000 per year during their four years of highest pay, the retiree's last employer must contribute additional funds into the Retirement System if the retiree's pension value significantly exceeds the annuitized value of the amount contributed on the retiree's behalf. N.C.G.S. § 135-5(a3) (2019). The employer must contribute additional funds if the ratio of the pension to the contributions exceeds the "cap factor." The cap factor is a ratio set by the Board. *Id*. Subsection 135-5(a3) specifically explains how a cap factor is to be set—an expert actuary must recommend the factor, and the cap factor must be of a value such that no more than three-quarters of one percent (0.75%) of retirees' plans will be capped by it. *Id*. Once the actuary recommends a cap factor, the provision states that the Board "shall adopt" it. *Id*. A plain reading of that provision shows that the Board has no discretion on this point; it must adopt the cap factor recommended by the actuary. The text of the Act provided that it would go into effect less than six months after its passage. An Act to Enact Anti-Pension-Spiking Legislation by Establishing a Contribution-Based Benefit Cap, S.L. 2014-88, § 1, 2014 N.C. Sess. Laws 291, 291–94. The General Assembly thus signaled in at least two ways that a cap factor should be established quickly: (1) by giving detailed instructions for how the Retirement System must adopt a cap factor to address the

problem and (2) by leaving a relatively short amount of time until the Act took effect.

The General Assembly has directed the Board to generally address actuarial calculations by accepting all documentation supporting actuarial recommendations and recording all such relevant information in its meeting minutes. N.C.G.S. § 135-6(l) (2019). In accordance with this statutory directive, it has been the Board's policy at least since 1981 to adopt actuarial recommendations by resolution and publication in meeting minutes, not by formal rulemaking procedures. 20 N.C. Admin. Code 2B.0202(a) (1981). In this case the Board followed these longstanding procedures and adopted a cap factor recommended by the actuary in compliance with subsection 135-5(a3).

Despite the detailed instructions the General Assembly gave the Board regarding the adoption of cap factors, the majority holds that the APA's rulemaking procedures, which require public notice and comment, also bind how the Board adopts cap factors. By doing so, it fails to properly apply the longstanding principle of statutory construction that the intent of the General Assembly controls. In accordance with legislative intent, the recent more specific statute relevant to the case should apply instead of the earlier more general statute; but the majority avoids this principle. It also ignores the appropriate consideration of the agency's longstanding practice regarding specialized and technical issues like the one in this case. The majority misses this straightforward analysis because it wrongly mines from dated case law a presumption that the APA's procedures should apply to all agency actions.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The best indicia of that intent are the language of the statute[,] . . . the spirit of the act[,] and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted). In this case all of those indicia support the Board's adoption of cap factors by resolution instead of by the APA's rulemaking procedures. The statutory language directs that the Board "shall adopt" the cap factor recommended by the actuary; the General Assembly intended that the Board follow the specific procedures it provided, and nothing more. The General Assembly has given precise guidelines to the Retirement System directly, choosing a cap factor is extremely technical and requires unique expertise, and the Board historically has adopted actuarial recommendations through resolution and publication, not through formal rulemaking.

The Retirement System should be allowed to use its own specialized procedures because the statute governing the adoption of a cap factor is more specific than the relevant provisions of the APA. When two statutes address the same subject matter, the more specific statute controls—the statute that more directly addresses the activity in question. *See Nat'l Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 629 151 S.E.2d 582, 586 (1966). In *Bring v. N.C. State Bar*, this Court considered whether the North Carolina State Bar Council, in promulgating a rule, had to follow the APA's rulemaking procedures or whether it could use the procedures described in the statute governing the Board of Law Examiners. 348 N.C. 655, 659–60, 501 S.E.2d 907, 910 (1998). That statute provided that the Board of Law Examiners could make rules and regulations related to State Bar admission as long as the State Bar Council gave approval. *Id.* at 657, 501 S.E.2d at 908. This Court held that "[i]t was not necessary to adopt the rule in accordance with the requirements of the APA," because the statute that created the Board of Law Examiners "gives specific directions as to how the Board shall adopt rules. These directions must govern over the general rule-making provision of the APA." *Id.* at 660, 501 S.E.2d at 910.

Here, like in *Bring*, the relevant statute is more specific than the APA. It specifically governs the adoption of cap factors by the Board. Though the APA generally requires an opportunity for public notice and comment before an agency enacts a rule, *see* N.C.G.S. § 150B-21.2 (2017), subsection 135-5(a3) specifically provides that the Board "shall adopt a contribution-based benefit cap factor recommended by the actuary, based upon actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped." N.C.G.S. § 135-5(a3). The statute then goes into even more detail on how the cap factor must be used to determine certain pension payments. *Id.*

The best reading of this statute, alongside the APA, is that, even though the APA's procedural requirements might generally apply to rules made by the Retirement System, when adopting a cap factor the Board should follow the specific path of subsection 135-5(a3). This reading complies with the specific-general canon of statutory construction and gives reasonable effect to both the APA and subsection 135-5(a3).

The majority's position, however, fails to give full effect to subsection 135-5(a3). That provision requires that the Board adopt the cap factor recommended by the actuary and mandates that the cap factor must cap no more than three quarters of one percent of retirement allowances. N.C.G.S. § 135-5(a3). An additional requirement of public notice

and comment could pressure the Board to ignore the specific guidelines of subsection 135-5(a3). If the actuary recommends a certain cap factor that complies with the "three-quarters-of-one-percent" ceiling but, during the public notice and comment portion of the proceedings, the public presents evidence in favor of a different cap factor, what is the Board to do? Under subsection 135-5(a3), the Board should choose the cap factor recommended by the actuary. But, under the APA, the Board must give due consideration to the cap factor that the commenting public recommended. The Board could not adequately do both.[1] Quintessentially here, the more specific statute should control over the more general one. *See Nat'l Food Stores*, 268 N.C. at 629, 151 S.E.2d at 586 (explaining that, when multiple statutes that would apply to a set of facts cannot be reconciled, the more specific statute should control, especially when the more specific statute was enacted later in time).

The statutory analysis should control this case. When interpreting the APA and subsection 135-5(a3) on their own terms and in light of one another, it is clear that the Board need not follow the APA's rulemaking procedures. That conclusion should be the end of the matter. Still, multiple other reasons exist to properly consider the agency's interpretation.

We should respect the Board's procedures under subsection 135-5(a3) because the determination of a cap factor requires special and technical expertise. This Court respects an agency's interpretation of a statute when the agency decisionmakers have special expertise in the area covered by the statute. *Wells v. Consol. Judicial Ret. Sys. of N.C.*, 354 N.C. 313, 320, 553 S.E.2d 877, 881 (2001) (explaining that an administrative interpretation of a provision is given great weight when "the subject is a complex legislative scheme necessarily requiring expertise"); *see also Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (explaining that "[t]he interpretation of a statute given by the agency charged with carrying it out is entitled to great weight"). Establishing a cap factor can be quite complex. That reality may partially explain why the General Assembly gave such technical guidelines and assigned most of the work to the expert actuary. This issue is therefore

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1. Moreover, as the majority notes, the APA "require[es] that, where the aggregate financial impact of an administrative agency decision upon all affected persons exceeds $1 million during a twelve-month period, the agency must generate a fiscal note describing, among other things, 'at least two alternatives to the proposed rule that were considered by the agency and the reason the alternatives were rejected,' " citing N.C.G.S. §§ 150B-21.4(b1)–(b2). I do not see how the Board could adopt only the cap factor recommended by the actuary, but also meaningfully consider at least two other alternatives. These provisions of the APA do not make sense when applied to the process of adopting cap factors.

not one for which additional public comment would likely be of much value. Indeed, when the Board did eventually adopt a cap factor through the APA's rulemaking procedures, it adopted an identical cap factor to the one it previously adopted under N.C.G.S. § 135-5(a3).

Plaintiff argues that because, in its view, school boards may not be able to handle the financial burden of making the payments required by the cap factor in some cases, the school boards and the public should have a say in the determination of the cap factor. The General Assembly, however, has already made a policy determination to address this issue. It mandated that a cap factor (1) shall be established, (2) based on the actuary's recommendation, (3) that applies only to those retirees earning an average of over $100,000 per year during their four highest paid years, and (4) that no more than three quarters of one percent of retirement plans could be affected by the cap factor.

Moreover, we should respect the Board's procedures because the Board has adopted actuarial recommendations through informal procedures for years without the General Assembly intervening to stop it. In construing administrative statutes, this Court gives "great weight to the administrative interpretation, especially when, as here, the agency's position has been long-standing and has been met with legislative acquiescence." *Wells*, 354 N.C. at 319–20, 553 S.E.2d at 881. At least since the latest version of its rule, which has been in effect since 1981, the Board has had the policy of adopting actuarial recommendations by resolution, not by formal rulemaking. 20 N.C. Admin. Code 2B.0202(a). The General Assembly has not stepped in to require it to do otherwise, so we may presume that the practice comports with legislative intent. *See Wells*, 354 N.C. at 319, 553 S.E.2d at 881 ("When the legislature chooses not to amend a statutory provision that has been interpreted in a specific way, we assume it is satisfied with the administrative interpretation."). Furthermore, the General Assembly affirmatively acted in the past to encourage this procedure. *See generally* N.C.G.S. § 135-6(l) (providing the process the Board is to utilize regarding actuarial assumptions). The General Assembly thus did not intend for the APA's procedures to apply.

The majority misses the preceding statutory analysis because it mistakenly mines from this Court's dated case law a presumption that the APA's procedures always control agency action unless a statute explicitly says otherwise. That blanket presumption applied under an older version of the APA, but it does not any more. Before 1991, the text of the APA explained that it would "apply to every agency . . . except to the extent and in the particulars that any statute . . . makes specific provisions to the contrary." *See* An Act to Improve the Administrative

Rule-Making Process, S.L. 1991-418, § 2, 1991 N.C. Sess. Laws 791 (removing the quoted language in 1991). This Court concluded when that text was in effect that "the General Assembly intended only those agencies it expressly and unequivocally exempted" from the APA to not be governed by it, and that any exempted agency is only exempted "to the extent specified by the General Assembly." *Vass v. Bd. of Trs. of Teachers' and State Emps.' Comprehensive Major Med. Plan*, 324 N.C. 402, 407, 379 S.E.2d 26, 29 (1989).

In 1991, however, the General Assembly amended the APA and removed that language. See An Act to Improve the Administrative Rule-Making Process, S.L. 1991-418, § 2, 1991 N.C. Sess. Laws 791. Now, the only provision containing similar language relates to "contested cases." *See* N.C.G.S. § 150B-1(e) (2017) ("The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter."). Rulemaking and other methods of adopting policies are not "contested cases."

Since the time the General Assembly amended the APA in that way, this Court has expressly presumed that the APA's procedures apply only when a "contested case" was central to the dispute. *See*, *e.g.*, *Empire Power Co. v. N.C. Dep't. of Env't, Health, and Nat. Res., Div. of Envtl. Mgmt.*, 337 N.C. 569, 573–74, 447 S.E.2d 768, 771 (1994). This Court has not held that the APA as amended presumptively applies to agency rulemaking or other policy enactments. I therefore disagree with the majority that the procedures found in the APA presumptively apply to the Board's adoption of a cap factor. If the majority is to recognize such a presumption, it must do so entirely based on an interpretation of the relevant statutes; our precedent does not demand it. Yet, as discussed above, a reasonable interpretation of the statutes does not support the majority's decision.

The specificity of the statute at hand, and its technical subject matter, rebuts any presumption that the APA's procedures apply. In subsection 135-5(a3), the General Assembly gave specific directions to the Retirement System about how to limit pension spiking, and those directions did not require formal rulemaking. That more detailed and targeted provision supplants the APA where the two provisions overlap. The Retirement System has long adopted the recommendations of actuaries, who have special expertise, through resolution of the Board and publication in the meeting minutes. The General Assembly intended these procedures to be sufficient.

I respectfully dissent.

IN RE B.C.B.

[374 N.C. 32 (2020)]

IN THE MATTER OF B.C.B.

No. 273A19

Filed 3 April 2020

1. Termination of Parental Rights—pleadings—sufficiency—failure to pay child support—willful abandonment

A mother's petition to terminate a father's parental rights was sufficient to survive the father's motion to dismiss. Contrary to the father's argument, the petition specifically alleged that his failure to pay child support and abandonment of his child were willful. Petitioner addressed at length the father's violation of child support orders and his failure to exercise visitation.

2. Termination of Parental Rights—grounds—willful abandonment—evidence and findings

The trial court appropriately found grounds to terminate a father's parental rights under N.C.G.S. § 7B-1111(a)(7) where the father argued that the evidence did not show willful abandonment. The trial court's findings demonstrated that respondent willfully withheld his love, care, and affection from his child during the determinative six-month period.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 22 April 2019 by Judge Kathryn Overby in District Court, Alamance County. This matter was calendared in the Supreme Court on 25 March 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

A.E., pro se, petitioner-appellee mother.

Mercedes O. Chut for respondent-appellant father.

NEWBY, Justice.

Respondent appeals from the trial court's order terminating his parental rights to B.C.B. (Brian).[1] We affirm.

Respondent and petitioner are the biological father and mother of Brian, who was born in 2015 during the parties' brief relationship. On

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

17 November 2016, petitioner filed a complaint for child custody and child support and requested the entry of an emergency ex parte temporary child custody order. The trial court granted petitioner temporary custody of Brian by ex parte order. On 30 November 2016, the parties entered into a Memorandum of Judgment which granted them joint legal custody of Brian and established a temporary custody schedule. A few months later, the parties entered into another Memorandum of Judgment which established a permanent child custody schedule. On 1 February 2017, petitioner obtained a domestic violence protection order (DVPO) against respondent based on incidents that occurred in November 2016.

In July 2017, respondent was arrested for driving while impaired. In September 2017, respondent was involved in an altercation with his pregnant girlfriend, which led to criminal charges and his girlfriend obtaining a DVPO against respondent. In October 2017, petitioner filed a motion for an ex parte order seeking sole custody of Brian. The trial court allowed the ex parte motion and suspended respondent's visitation until a hearing could be held. After a hearing, in November 2017, the trial court awarded petitioner sole custody of Brian and granted respondent supervised visitation once a week at Family Abuse Services.

On 6 December 2018, petitioner filed a complaint in the trial court which she intended to be a petition to terminate respondent's parental rights. Respondent was appointed counsel to represent him in the matter, and on 31 January 2019, counsel filed a motion to dismiss for lack of subject matter jurisdiction. On 21 February 2019, the trial court dismissed the petition for lack of subject matter jurisdiction because the petition was not properly verified.

Six days later, petitioner refiled her petition. Petitioner alleged respondent's parental rights to Brian should be terminated on the basis of willful abandonment and respondent's failure to pay child support. *See* N.C.G.S. § 7B-1111(a)(4), (7) (2019). On 26 March 2019, respondent moved to dismiss the petition under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (2019). On the same day, respondent filed an answer denying many of the material allegations in the petition. A few weeks later, prior to the termination hearing, the trial court denied respondent's motion to dismiss the petition.

On 22 April 2019, the trial court entered an order in which it determined that grounds existed to terminate respondent's parental rights on the basis of willful abandonment. *See* N.C.G.S. § 7B-1111(a)(7). It also concluded that it was in Brian's best interest that respondent's

parental rights be terminated. The court thus terminated respondent's parental rights, and respondent appealed to this Court.

Respondent argues that the trial court erred (1) by denying his motion to dismiss the petition and (2) by terminating his parental rights on the basis of willful abandonment. We address each of these arguments in turn.

[1] First, respondent contends that petitioner failed to sufficiently allege grounds to terminate his parental rights under N.C.G.S. § 7B-1104 and, therefore, the trial court should have dismissed the petition for failure to state a claim upon which relief can be granted. Specifically, respondent claims that the petition contains allegations regarding the child support order and his failure to make payments under that order but fails to allege that respondent's failure to pay was willful. He also argues that although the petition cites N.C.G.S. § 7B-1111(a)(7) and references the requirements of the custody order, it neither alleges that he willfully failed to comply with the order nor alleges facts supporting the termination of his parental rights on the basis of willful abandonment. We disagree and hold that the petition was sufficient to survive respondent's motion to dismiss.

A petition seeking to terminate parental rights must state "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." N.C.G.S. § 7B-1104(6) (2019). We agree with the Court of Appeals that "[w]hile there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue." *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002).

The petition here cited both N.C.G.S. § 7B-1111(a)(4) and (7) as grounds for termination and specifically alleged that respondent's failure to pay child support and his abandonment of Brian were willful. In support of these allegations, petitioner cited the trial court's custody and child support orders. Contrary to respondent's claims, petitioner addressed at length respondent's violation of the child custody orders, which she claimed show respondent's willful abandonment of Brian. Petitioner specifically alleged that since September 2017, respondent had declined to exercise visitation as permitted by the trial court. The petition thus contained more than a mere recitation of the statutory grounds for termination and gave respondent sufficient notice of the "acts, omissions or conditions . . . at issue." *In re Hardesty*, 150 N.C. App. at 384, 563 S.E.2d at 82. Therefore, we hold that the trial court's denial of respondent's motion to dismiss was appropriate.

[2] Second, respondent contends that the trial court erred by terminating his parental rights on the basis of willful abandonment. Specifically, he challenges several of the trial court's findings of fact and argues that record evidence does not show that he willfully abandoned Brian. We disagree and hold that the trial court's determination that grounds existed to terminate respondent's parental rights was supported by its findings of fact and that those findings are supported by clear, cogent, and convincing evidence.

A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under subsection 7B-1111(a). N.C.G.S. § 7B-1109(f) (2019). When reviewing a trial court's determination that grounds existed to terminate parental rights, we ask "whether the [trial court's] findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). If the petitioner meets her burden during the adjudicatory stage, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110). In this case respondent only challenges the trial court's determination at the adjudicatory stage that statutory grounds existed to terminate his parental rights.

A trial court may terminate a parent's parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. at 251, 485 S.E.2d at 617 (citation omitted). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted). "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986).

"[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (citation omitted).

The relevant six-month period in this case is from 27 August 2018 to 27 February 2019. The trial court made the following pertinent findings of fact:

> 25. The petitioner filed a motion for [an] ex parte order in 16 CVD 2098 on October 2, 2017. Judge Messick allowed that ex parte order on October 4, 2017 suspending the respondent father's visitation until a hearing could be held.
>
> 26. On November 7, 2017 Judge Messick had a hearing on the return on the ex parte order. He granted the petitioner sole legal custody of the minor child. Judge Messick allowed the respondent father visitation with the minor child once a week at Family Abuse Services (FAS) supervised visitation center.
>
> 27. The petitioner went shortly thereafter to sign up for her portion of the supervised visitation agreement. The respondent father spoke to his attorney about going to FAS for visits in December 2017, but he did not contact FAS for supervised visitation until February 15, 2019, some fifteen months after being ordered to do so by Judge Messick. When he did set up visitation at FAS, the respondent father requested weekends, however he forgot that he was to be incarcerated on weekends in March and April for a Driving While Impaired split sentence. He also forgot to show up for that first jail weekend, resulting in his serving seven days straight in the Alamance County Jail. The weekend jail schedule was set on February 7, 2019.
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> 28. The respondent father then followed up at FAS on March 29, 2019 about his visits with the minor child, some six weeks after his first contact with FAS.
>
> 29. The respondent father indicated that it took from December 2017 to February 2018[2] to go contact FAS for

2. This date appears to be a clerical error. The correct date was in February 2019.

visits with the minor child because he had so much going on. The Court does not find this to be credible.

30. During the ex parte hearing on November 7, 2017 the petitioner's attorney argued for the respondent father to attend the domestic violence prevention program (DVPP) before exercising visitation with the minor child. Neither in his oral rendition of the order in open court on November 7, 2017 nor in his written order did Judge Messick order such a requirement. Rather Judge Messick allowed the respondent father visitation at FAS once a week with no prerequisites.

31. The respondent father was in Court when Judge Messick rendered his order orally. He testified that he never received a copy in the mail of the written order. However, the respondent father never came to the court house and requested a copy of the order. Nor did he update his address with the clerk's office to receive information in a timely fashion. His attorney argued that it was the petitioner's attorney's responsibility to make sure that the respondent father received a copy of the Court's order. The Court finds this to be over burdensome on the attorney. The burden sits firmly with the party and they have the responsibility to update the clerk with any and all address changes.

32. The respondent father testified that he did not exercise his visitation with the minor child nor did he reach out to the petitioner from November 2017 through January 2018 because he thought he had to enroll in and complete DVPP before visitation could begin. This was an erroneous assumption. Even if he was correct in his assumption, he did not communicate with the petitioner about the well-being of the minor child during this time frame. He did not send any cards, letter or presents to the minor child during this time frame.

33. The petitioner's parents have lived in the same residence for over twenty-eight (28) years. The respondent father has been to that residence multiple times with the petitioner. Yet the respondent father never made any contact with the petitioner's parents to inquire about the well-being of the minor child or to leave gifts . . . for the minor child.

. . . .

37. On January 16, 2018 Judge Messick renewed the DVPO for two additional years with the modification that the respondent father was to have no contact with the petitioner. There is no constraint on the respondent father's ability to contact the minor child.

. . . .

42. Even though it was ordered in November 2017 the respondent father did not begin DVPP until February 22, 2018. He was unsuccessfully terminated from the DVPP on July 13, 2018 for missing four sessions, not for non-payment.

. . . .

58. The respondent father has willfully chosen not to see or inquire about the minor child since September 2017.

"Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citation omitted). We review only those findings necessary to support the trial court's conclusion that grounds existed to terminate respondent's parental rights on the basis of willful abandonment. *Id.* at 407, 831 S.E.2d at 58–59 (citing *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133).

Respondent challenges findings of fact 26, 27, 28, 30, 32, 33, 37 and 58. He first contends that Finding of Fact No. 26 wrongly states that he was allowed visitation with Brian because Judge Messick did not immediately institute supervised visits. Respondent claims that, instead, Family Abuse Services imposed requirements on both parties that were to be completed before visits could be arranged. We disagree. The child custody order shows that respondent was granted supervised visitation with Brian and that the only prerequisite was that both parties were required to complete an intake session with Family Abuse Services within two weeks of the trial court's order. Petitioner attended an intake session on 8 November 2017, the day after the custody hearing. Had respondent attended an intake session as ordered, he could have exercised visitation immediately. We conclude that there is sufficient evidence in the record to support Finding of Fact No. 26.

Respondent next challenges findings of fact 27, 28 and 30. Respondent argues that the evidence ultimately does not show that he

had the ability to complete the intake session and attend visitation with Brian before February 2019. He also argues that the trial court's findings that he, in essence, willfully ignored the trial court's order granting him supervised visitation are not supported by the evidence. We disagree.

Petitioner testified at the termination hearing that in open court respondent was granted supervised visitation through Family Abuse Services with no prerequisites. Respondent, however, testified that he believed he had to complete the domestic violence prevention program courses before he could exercise visitation. After hearing the testimony of both petitioner and respondent and evaluating their credibility, the trial court determined that there was no such requirement. This Court is not in a position to question that determination. *See In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 (stating that the trial judge has the duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom); *see also Scott v. Scott*, 157 N.C. App. 382, 388, 579 S.E.2d 431, 435 (2003) (stating that when the trial court sits as fact-finder, it is the sole judge of the credibility and weight to be given to the evidence, and the appellate courts should not substitute their judgment for the trial court's judgment). We thus conclude that sufficient record evidence supports findings of fact 27, 28, and 30.

The trial court's findings of fact regarding respondent's failure to contact Family Abuse Services about visitation privileges until March 2019, including findings of fact 28 and 29, are further supported by the record. Respondent contends that he did not complete the intake session and attend visitation because he was incarcerated three times during the relevant period. He further asserts that he did not testify at the termination hearing that he failed to arrange visits because "he had so much going on." We are unpersuaded. Although respondent was incarcerated for portions of the relevant six-month period, he was not incarcerated for its entirety. Respondent was incarcerated when he was served with petitioner's first petition to terminate his parental rights, but he was released from custody soon thereafter. Respondent was not incarcerated in January 2019 or during the period before respondent filed the petition to terminate his parental rights on 27 February 2019. Respondent further testified that after he was served with the initial, improperly verified petition to terminate his parental rights, he discussed with his attorney that he could go to Family Abuse Services to begin the process of setting up visitation with Brian, but nevertheless failed to do so. He also explained that he failed to go to Family Abuse Services in January 2019 because he had "so much going

on at one time." Thus, the trial court's findings of fact are supported by clear, cogent, and convincing evidence.

Respondent challenges the trial court's factual finding stating that he was represented by counsel at the 7 November 2017 hearing. We agree that this portion of the trial court's finding of fact was erroneous. Respondent's testimony and the child custody order from the hearing show that respondent was acting as his own counsel. We thus disregard this portion of the trial court's factual finding.

Respondent next argues that portions of findings of fact 32, 33, and 37 are erroneous. He claims the record contains no evidence that he had any way to contact Brian during the relevant six-month time period immediately preceding the filing of the petition to terminate his parental rights. He argues that he was prevented from contacting Brian due to the DVPO and because he did not have petitioner's contact information. We disagree. Though respondent may have been prevented from contacting petitioner during the six months immediately preceding the filing of the petition because of the DVPO, the order did not prohibit respondent from contacting Brian or petitioner's parents. Petitioner also testified that respondent knew her parents and their address but neither made an effort to contact her parents to inquire about Brian's welfare nor left any cards or gifts for Brian. The record contains sufficient evidence to support the relevant portions of findings of fact 32, 33, and 37.

Respondent next challenges Finding of Fact No. 58, in which the trial court found that he willfully chose not to see Brian. He argues that the evidence does not show that respondent made a "willful determination to forego all parental duties and relinquish all parental claims" to Brian. We disagree. The Court of Appeals has correctly stated that a parent "will not be excused from showing interest in [a] child's welfare by whatever means available[,]" even if "his options for showing affection [were] greatly limited." *See In re R.R.*, 180 N.C. App. 628, 634, 638 S.E.2d 502, 506 (2006) (citation omitted) (rejecting respondent-father's argument that "he did not willfully abandon the child because he was not given the opportunity to participate in the child's life").

The trial court's findings of fact establish that respondent made no effort whatsoever during the statutory period to participate in Brian's life. These findings are supported by clear, cogent, and convincing evidence. Petitioner filed her initial petition to terminate respondent's parental rights in December 2018, which was dismissed and subsequently refilled by petitioner in February 2019. After respondent was served with the first petition to terminate his parental rights in December

2018, he discussed with his attorney that he could go to Family Abuse Services to set up visitation with Brian. Nonetheless, respondent never went to Family Abuse Services to do so. Respondent was released from custody in December 2018, so, contrary to respondent's argument, his incarceration would not have hindered visitation. Though respondent was out of jail and fully aware that he could exercise visitation rights, he did not visit Brian. Thus, after being made aware that petitioner was seeking to initiate proceedings to terminate his parental rights, and after being given a second chance to prioritize his responsibility to care for Brian, respondent took no action because he had "so much going on at one time." Additionally, respondent neither sent Brian any gifts or cards nor inquired about Brian's welfare despite having petitioner's parents' address. Respondent also was not prohibited from contacting them. The trial court properly determined that respondent willfully chose not to see Brian.

The trial court's findings of fact demonstrate that respondent "willfully withheld his love, care, and affection from [Brian] and that his conduct during the determinative six-month period constituted willful abandonment." *In re C.B.C.*, 373 N.C. 16, 23, 832 S.E.2d 692, 697 (2019) (citation omitted). The trial court appropriately found grounds to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(7). We affirm.

AFFIRMED.

IN RE C.J.C.

[374 N.C. 42 (2020)]

IN THE MATTER OF C.J.C.

No. 259A19

Filed 3 April 2020

1. Termination of Parental Rights—guardian ad litem—attorney advocate—failure to check box on AOC form—clerical error

On appeal from the termination of a father's parental rights to his child in a private termination action between the two parents, the Supreme Court rejected the father's argument that the trial court erred by failing to appoint a guardian ad litem (GAL) for the child. The attorney advocate was appointed to serve as both GAL and attorney advocate for the child, and the trial court's failure to check the box for "Attorney Advocate is also acting as [GAL]" on the appropriate form was a mere clerical error. Further, the attorney advocate competently fulfilled his role as GAL.

2. Termination of Parental Rights—best interests of the child—private termination action—likelihood of adoption—dispositional factors

In a private termination of parental rights action between a child's two parents, the trial court did not abuse its discretion by concluding that the child's best interests would be served by termination of the father's parental rights. The mother's relationship with her boyfriend was not sufficiently relevant to require findings on the potential for future adoption, and the trial court properly balanced the factors in N.C.G.S. § 7B-1110(a), including the child's young age, lack of any bond with the father, and need for consistency.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 4 April 2019 by Judge Wesley W. Barkley in District Court, Burke County. This matter was calendared for argument in the Supreme Court on 25 March 2020, but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee mother.

David A. Perez for respondent-appellant father.

MORGAN, Justice.

IN RE C.J.C.

[374 N.C. 42 (2020)]

This appeal arises from a private termination of parental rights action between a child's two parents. Respondent, the natural father of C.J.C. (Caleb),[1] appeals from the trial court's order terminating respondent's parental rights to the child. We affirm the determination of the trial court.

At the time of Caleb's birth in September 2014, petitioner—Caleb's mother—and respondent were living together. They were not married. The parents ended their relationship in November 2015, after which Caleb resided with petitioner.

Following her separation from respondent, petitioner filed a custody action in District Court, Burke County. In an order entered on 21 March 2016, the trial court incorporated the terms of the parties' Parenting Agreement, and in accordance with the agreement, granted primary physical and legal custody of Caleb to petitioner, with respondent exercising specific visitation rights. Respondent was ordered to pay child support in the sum of $50 per week in an order entered on 16 May 2016.

On 8 March 2017, petitioner and respondent entered into a Consent Order in which respondent was relieved of ongoing child support payments. Petitioner continued to have primary legal and physical custody of Caleb, and respondent was granted visitation with Caleb "as the parties mutually agree."

On 8 October 2018, petitioner filed a petition to terminate respondent's parental rights on the grounds that Caleb was born out of wedlock, and that respondent failed to provide substantial financial support or consistent care with respect to Caleb and petitioner; and that respondent had willfully abandoned Caleb. N.C.G.S. § 7B-1111(a)(5)(d.), (7) (2019). Respondent filed an answer on 31 October 2018, denying that grounds existed to terminate his parental rights.

After multiple continuances, the trial court held a hearing on the petition on 21 March 2019. On 4 April 2019, the trial court entered an order concluding that grounds existed to terminate respondent's parental rights based on willful abandonment and that termination of respondent's parental rights was in Caleb's best interests[2]. Accordingly, the trial court terminated respondent's parental rights. Respondent appealed.

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1 A pseudonym is used to protect the juvenile's identity and to facilitate the ease of reading.

2. The phrases "best interest" and "best interests" are utilized interchangeably by legal sources which are cited in this opinion. In order to harmonize the usage of this phrase throughout this opinion and in light of the lack of any substantive difference in the

[1] Respondent first argues that the trial court erred in failing to appoint a guardian ad litem (GAL) for Caleb. Respondent contends that while an attorney advocate was appointed in the matter, nonetheless, this attorney was not appointed in the capacity of GAL, and that the trial court's failure to appoint a GAL in this case is prejudicial error requiring reversal. We reject respondent's argument and conclude that the attorney at issue was appointed to serve as both GAL and attorney advocate for Caleb.

The record here contains the Administrative Office of the Courts Form AOC-J-207—"ORDER TO APPOINT OR RELEASE GUARDIAN AD LITEM AND ATTORNEY ADVOCATE"—filed on 11 December 2018. The preprinted portions of this form note that appointments which appear in the form are made pursuant to N.C.G.S. §§ 7B-601[3] (abuse, neglect, and dependency petitions) and 7B-1108 (termination of parental rights). In termination of parental rights (TPR) proceedings, N.C.G.S. § 7B-1108(b) *requires* the appointment of a GAL for the juvenile where a respondent parent denies material allegations in the TPR petition. N.C.G.S. § 7B-1108(b) (2017) ("If an answer or response denies any material allegation of the petition or motion, the court shall appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile . . . ."). In addition, this subsection provides that "[a] licensed attorney shall be appointed to assist those guardians ad litem *who are not attorneys licensed to practice in North Carolina*." *Id.* § 7B-1108(b) (emphasis added). In other words, where a respondent parent files an answer denying material allegations in the petition as Caleb's father has done in the present case, the trial court (1) must appoint a GAL for the juvenile, and (2) must appoint a licensed attorney (or "attorney advocate") if the appointed GAL is not an attorney licensed to practice in this state. In conformance with these statutory provisions, there are sections on Form AOC-J-207 to designate a GAL and to designate an attorney advocate. In the space where an attorney advocate's name is to appear, there is a box to be checked if "Attorney Advocate is also acting as Guardian ad Litem."

In the instant case, the information entered on the Form AOC-J-207 displays the name "Steve Cheuvront" in the space to designate an

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terminology, the phrase "best interests" will be employed, even if a quoted source used the alternative terminology.

3. Pursuant to N.C.G.S. § 7B-607, a GAL for the juvenile *must* be appointed in abuse and neglect cases and *may* be appointed in dependency matters. N.C.G.S. § 7B-601(a) (2017). The instant matter does not fall under section 7B-607.

"Attorney Advocate" and leaves blank the document's section for a GAL. The district court judge who signed the form failed to check the box denoting that the designated attorney advocate Cheuvront was also acting as the guardian ad litem. However, a review of the other documents and transcripts in the record on appeal plainly indicates that this failure of the district court judge to check the GAL box was merely a clerical error, not a prejudicial substantive or procedural error. *See In re A.D.L.*, 169 N.C. App. 701, 707, 612 S.E.2d 639, 643 (stating that where "the [GAL] carried out her respective duties, failure of the record to disclose [GAL] appointment papers does not necessitate reversal of the district court's decision"), *disc. review denied*, 359 N.C. 852, 619 S.E.2d 402 (2005). For example, Cheuvront is referred to as "the Guardian ad Litem," both in the written adjudication and disposition order, as well as on the cover page of both the hearing and trial transcripts. The transcript contains an exchange on 13 December 2018 between the trial court and respondent's trial counsel during which counsel explained the need to continue a hearing because "Mr. Cheuvront was appointed as guardian ad litem yesterday." On 10 January 2019, the transcript shows that there was a discussion among the parties and the trial court about another continuance in which respondent's trial counsel mentioned that "the guardian ad litem" had not yet been able to meet with him.

At the hearing on the TPR petition when the trial court called the matter on 21 March 2019, it noted, "All parties are present. We have Mr. Cheuvront, who's guardian ad litem in this matter. Anything before we begin the hearing from the petitioner?" Neither respondent nor his counsel expressed any concerns or raised any issues regarding Cheuvront's role as GAL during the TPR hearing. After the parties presented their evidence, the trial court asked Cheuvront, "[a]s guardian ad litem in this matter," if Cheuvront had anything to add to assist the trial court in making its decision. Cheuvront then provided an account of his interactions with the parties and with Caleb. Again, neither respondent nor his trial counsel registered any question or matter about Cheuvront's role as GAL in the case. It is clear from the record and transcript that the trial court did, in fact, appoint Cheuvront as GAL for Caleb. Respondent's contention to the contrary, based on an apparent clerical error, is without merit.

Respondent also contends that Cheuvront did not fulfill the duties of a GAL because Cheuvront failed to "offer evidence and examine witnesses at adjudication" and "explore options with the court at the dispositional hearing." N.C.G.S. § 7B-601 (2019). Section 7B-601(a) of our General Statutes provides that

> [t]he duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

N.C.G.S. § 7B-601(a). "[I]f the GAL is an attorney, that person can perform the duties of both the GAL and the attorney advocate." *In re J.H.K.*, 365 N.C. 171, 175, 711 S.E.2d 118, 120 (2011). Here, Cheuvront investigated the case prior to the termination hearing by contacting the parties, visiting the child Caleb at petitioner's home, and going to petitioner's workplace. As noted above, Cheuvront reported his observations to the trial court at the TPR hearing. Cheuvront competently fulfilled his role as guardian ad litem—a status which was unquestioned and unchallenged upon repeated references to Cheuvront's role in this regard—and the trial court's clerical oversight in its execution of Form AOC-J-207 regarding its failure to check the GAL designation box for the person whom it properly designated on the same form to serve as Attorney Advocate was not prejudicial error. Consequently, we are not persuaded by this argument.

[2] In his second contention, respondent asserts that the trial court abused its discretion by concluding that it would be in Caleb's best interests to terminate respondent's parental rights. Specifically, respondent claims that the trial court failed to make sufficient findings regarding the factors set forth in N.C.G.S. § 7B-1110(a) and did not properly balance those factors.

Once the trial court finds that at least one ground exists to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest[s]" based on the following factors:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019).

"The district court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 423 (2019) (internal citation, quotation marks, and brackets omitted).

Here, the trial court made the following findings of fact in determining that termination of respondent's parental rights was in Caleb's best interests:

> 1. That the [c]ourt has the authority to terminate the parental rights of the Respondent pursuant to the findings of fact and conclusions of law. As to best interests, the [c]ourt has previously found grounds for termination exist and as to this portion, the [c]ourt has considered all those factors that are under the statute, particularly focusing on the age of [Caleb] . . . [who is] 4½ years old. He's been in one family care unit his entire life, with that particularly being with the mother. For the last two years he's only known one parent caretaker, that being the Petitioner/mother. As found with grounds, the Respondent/father has been minimally involved even prior to the filing of this Petition. Therefore, he essentially has no bond at all with the child. If there is a bond it is very tenuous, particularly the fact that he's had no contact with the child directly since 2017. He's also provided, as indicated, no maintenance, love, support, affection. He's made a couple of contacts with the mother.
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> 2. Certainly the [c]ourt does find that the family of the father is concerned for the child and does show some

> genuine care for the child. However, essentially the [c]ourt is looking at the child's best interest[s] in regards to the father and his situation and, while [respondent's attorney] does make a point that termination essentially doesn't change what's happening as we sit here today, the [c]ourt is going to find that it's in the best interest[s] due to the fact that this young child does need some consistency and needs to as the statute requires develop a bond of significance. I agree that we are not in a position to anticipate adoption given where we are right now; however, the lack of any bond with the father, the young age of the child, and the fact that a termination of parental rights would assist in achieving a consistency along with the factors that were found in the adjudication, the [c]ourt will grant the order of termination and find that termination of the Respondent's rights are in [Caleb's] best interests.

Respondent has not challenged these findings, and therefore, they are binding on appeal. *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 54 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). On the other hand, respondent argues that the trial court failed to make sufficient findings regarding the factors set forth in N.C.G.S. § 7B-1110(a). Specifically, he contends that the trial court failed to make findings addressing petitioner's relationship with her boyfriend, Clayton Dennis[4], and the quality of Caleb's relationship with petitioner's boyfriend.

Although the trial court must consider all of the factors in N.C.G.S. § 7B-1110(a), it "is only required to make written findings regarding those factors that are relevant." *In re A.R.A.*, 373 N.C. at 199, 835 S.E.2d at 424. "[A] factor is relevant if there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the [district] court[.]" *Id.* (citation and internal quotation marks omitted) (second and third alteration in original).

There was no conflict in the evidence regarding either petitioner's or Caleb's relationship with Clayton Dennis that would require the trial court to make specific findings. Both petitioner and Dennis testified that although they were not engaged to be married at the time of the hearing, they had been dating for two years and planned to get married. Dennis testified that his relationship with Caleb was "awesome" and that Caleb

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4. A pseudonym is again employed to protect the juvenile's identity due to the relationship of "Clayton Dennis" with the juvenile's mother.

"just wants to be around [him]"; petitioner testified that Caleb has benefitted from his relationship with Dennis. Both petitioner and Dennis offered testimony that Dennis was like a father figure for Caleb and did "what a father figure should do." Respondent reasons that if the plan was for Dennis to adopt Caleb in the future, then the trial court failed to make any findings regarding how termination of parental rights would aid such a plan. Aside from the fact that the private nature of this termination proceeding means that there is no permanent plan as that term is used in N.C.G.S. § 7B-1110(a)(3), respondent acknowledges in his brief that the trial court observed that it could not anticipate adoption at the time of the hearing, since petitioner and her boyfriend Dennis had not set a wedding date. Consequently, the factor of petitioner's relationship with Clayton Dennis was not sufficiently relevant to require the trial court to make findings concerning the impact of said relationship on termination of respondent's parental rights or on the adoption of Caleb.

Finally, respondent argues that the trial court improperly balanced the factors set forth in N.C.G.S. § 7B-1110(a) and abused its discretion in determining that termination of respondent's parental rights was in Caleb's best interests. He deduces that since the trial court found that it was "not in a position to anticipate adoption given where we are right now[,]" it therefore implicitly found that there was not a likelihood of adoption in the future. Respondent further asserts that because Dennis was not in a position to adopt Caleb, termination of respondent's parental rights "accomplished *nothing* except to make another child fatherless[,]" and that termination "legally destroyed" valuable relationships with paternal family members without creating a new paternal relationship. In our view, the trial court's findings demonstrate that it considered the factors set forth in N.C.G.S. § 7B-1110(a) and determined that Caleb's young age, the child's lack of any bond with respondent, and the child's need for consistency—combined with respondent's lack of involvement with the child—supported a finding that termination of respondent's parental rights was in Caleb's best interests. Although the trial court found that it was "not in a position to anticipate adoption[,]" this is only one factor which the trial court must consider. This factor becomes more relevant in a TPR case in which a child is in the custody of a Department of Social Services agency and termination of the parent's rights leaves the child as a ward of the State. The present case, however, involves a private termination of parental rights initiated by the child's mother, who had full custody of the child at the time of the TPR hearing. Therefore, the likelihood of Caleb's potential adoption under this set of circumstances is not a sufficiently relevant factor as respondent depicts it in determining whether termination of respondent's parental rights was in Caleb's best interests.

Based on the foregoing analysis, this Court is satisfied that the trial court's conclusion that termination of respondent's parental rights was in Caleb's best interests was neither arbitrary nor manifestly unsupported by reason. Therefore, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF K.N.K.

No. 231A19

Filed 3 April 2020

1. Termination of Parental Rights—grounds—willful abandonment—determinative time period—no contact or financial support

In a termination of parental rights action between a child's two parents, the trial court's findings supported its adjudication of willful abandonment where, during the determinative time period, the father had no contact with the child and provided no financial support for her.

2. Termination of Parental Rights—grounds—willful abandonment—challenged findings—outside determinative time period

In an appeal from the trial court's order terminating a father's parental rights on the grounds of willful abandonment, any error in the trial court's findings challenged by the father were harmless where those challenged findings concerned his actions outside the six-month determinative time period preceding the filing of the petition.

3. Termination of Parental Rights—best interests of the child—dispositional factors—private termination action—intention of mother's husband to adopt child

The trial court did not abuse its discretion in concluding that a child's best interests would be served by the termination of her father's parental rights in an action between her two parents, where the trial court demonstrated careful consideration of the dispositional factors of N.C.G.S. § 7B-1110(a), including the strong bond between the child and the mother's husband, his intention

to adopt her, and the loving environment in the home of the mother and her husband.

4. Termination of Parental Rights—best interests of the child—constitutionally protected status as parent—forfeiture—willful abandonment

A father lost his constitutionally protected paramount right to the custody, care, and control of his child when the trial court determined that he had willfully abandoned her under N.C.G.S. § 7B-1111(a)(7), and the trial court thereafter properly considered whether the child's best interests would be served by the termination of her father's parental rights—without regard for his constitutionally protected status.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 18 March 2019 by Judge Ward D. Scott in District Court, Buncombe County. This matter was calendared in the Supreme Court on 25 March 2020 and determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee mother.

Leslie Rawls for respondent-appellant father.

NEWBY, Justice.

Respondent, father of the minor child K.N.K. (Kathy),[1] appeals from the trial court's order granting the petition filed by the child's mother (petitioner) for the termination of respondent-father's parental rights. We affirm.

Petitioner and respondent were involved in a relationship from 2010 to 2012 but never married. Kathy was born in December 2011 and has lived with petitioner in Buncombe County, North Carolina since birth. On 25 August 2014, respondent filed a complaint against petitioner with the District Court in Buncombe County, seeking joint legal custody of Kathy and visitation. Petitioner obtained a domestic violence protective order (DVPO) against respondent on 27 August 2014 that continued through 12 May 2018; since 12 May 2015, that order has included Kathy

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

as well, excepting only court ordered supervised visitation with respondent.[2] Petitioner filed an answer in the custody matter on 28 October 2014, requesting sole custody of Kathy and attorney's fees.

On the morning of the custody hearing, respondent advised the court he was abandoning his claim for joint custody of Kathy. On 1 June 2015, the trial court awarded petitioner "sole care, custody and control" of Kathy, finding that respondent "failed to take his role and responsibility as a parent of the minor child seriously." The court granted respondent twice monthly supervised visitation with Kathy at the Mediation Center through its Family Visitation Program and invited respondent to "file the appropriate motion before this Court" to modify the order once he "demonstrated the ability to be consistent with the visits" and "demonstrate[d] that he is stable and operating at a higher maturity level . . . ." Respondent was also ordered to pay $4,915.70 in attorney's fees to petitioner's counsel.

On 11 September 2017, petitioner filed a petition to terminate respondent's parental rights. *See* N.C.G.S. §§ 7B-1100, -1104 (2019). After hearing evidence over four dates between 9 July 2018 and 14 November 2018, the trial court entered an order terminating respondent's parental rights on 18 March 2019. In doing so, the court concluded respondent had willfully abandoned Kathy within the meaning of N.C.G.S. § 7B-1111(a)(7) (2019), and such abandonment justified termination. Based on its adjudication, the court proceeded to the dispositional stage of the proceeding under N.C.G.S. § 7B-1110(a) (2019) and determined it was in Kathy's best interest to terminate respondent's parental rights. Respondent appealed. *See* N.C.G.S. § 7B-1001(a1)(1) (2019).

Respondent claims the trial court's findings do not support its adjudication under N.C.G.S. § 7B-1111(a)(7), which authorizes the termination of parental rights if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." Respondent also claims the trial court abused its discretion

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2. Before being served with the custody action, petitioner obtained an *ex parte* DVPO against respondent on 27 August 2014 based on respondent's threatening Facebook posts about petitioner. Respondent then unsuccessfully sought an *ex parte* DVPO against petitioner on 3 September 2014. On 11 September 2014, the trial court transferred the parties' DVPO actions to family court and consolidated them with the custody proceeding. Following a series of continuances, the trial court held a hearing in the consolidated action on 12 May 2015. On 12 May 2015, the trial court granted petitioner a DVPO forbidding respondent to be in the presence of petitioner or Kathy unless otherwise allowed by the court's visitation order in the case. The court subsequently renewed the one-year DVPO for two additional years until 12 May 2018. The court dismissed respondent's DVPO action against petitioner.

at the dispositional stage of the proceeding by concluding Kathy's best interest would be served by terminating his parental rights.

"We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)); *see also* N.C.G.S. § 7B-1109(f) (2019). Unchallenged findings are deemed to be supported by the evidence and are "binding on appeal." *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019). "Moreover, we review only those [challenged] findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019); *accord In re A.R.A.*, 373 N.C. 190, 195, 835 S.E.2d 417, 421 (2019) (reviewing only the challenged findings necessary to support the trial court's determination that grounds for termination existed).

[1] A court may terminate parental rights if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." N.C.G.S. § 7B-1111(a)(7).

> "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. [244,] 251, 485 S.E.2d [612,] 617 [1997] (citation omitted). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted).

In re N.D.A., 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (alteration in original). The willfulness of a parent's actions is a question of fact for the trial court. *See Pratt*, 257 N.C. at 501, 126 S.E.2d at 608; *see also Stancill v. Stancill*, 241 N.C. App. 529, 531, 773 S.E.2d 890, 892 (2015) ("Where the trial court sits as the finder of fact, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial court." (quoting *Brandon v. Brandon*, 132 N.C. App. 646, 651–52, 513 S.E.2d 589, 593 (1999))). " 'Intent' and 'wilful[l]ness' are mental emotions and attitudes and are seldom capable of direct proof; they must ordinarily be proven by circumstances from which they may be inferred . . . ." *State v. Arnold*,

264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. at 77, 833 S.E.2d at 773 (quoting *In re D.E.M.*, 257 N.C. App. 618, 619, 810 S.E.2d 375, 378 (2018)).

Here petitioner filed her petition in this case on 11 September 2017. Therefore, respondent's conduct toward Kathy in the period from 11 March 2017 to 11 September 2017 is at issue. *See Young*, 346 N.C. at 251, 485 S.E.2d at 617. The trial court found that, during the determinative period, respondent "has withheld his presence, his love and care, and foregone his opportunities to display his filial affection for the minor child since 2014," and respondent "did have the settled intent to forego all parental responsibility and in fact did forego all of those responsibilities since at least 2014." In concluding respondent "has abandoned the minor child for at least six (6) months preceding the filing of the Petition in this matter consistent with N.C.G.S. § 7B-1111(a)(7)," the court also expressly found respondent's "conduct was intentional and willful and evinced a settled purpose to forego all parental duties and relinquish all claims to the minor child." This ultimate, dispositive finding must be supported by the evidence and by the evidentiary facts found by the trial court. *See In re N.D.A.*, 373 N.C. at 76–77, 833 S.E.2d at 773.

The trial court's adjudicatory findings show that, from 2014 until the petition's filing date, respondent had no contact or communication of any kind with Kathy; provided no financial support for Kathy;[3] sent Kathy no cards, gifts, or letters; and neither attended nor attempted to attend any of Kathy's medical appointments, educational functions, or extracurricular activities. Moreover, despite having been awarded twice

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3. Though evidentiary support exists for the finding, respondent objects to the trial court's reliance on the fact that he failed to provide any financial support for Kathy during the relevant period as a basis to conclude he willfully abandoned the child. Because he received Social Security Disability Income (SSDI) benefits, respondent contends the court's finding improperly "suggests" he could provide support for Kathy.

Notwithstanding respondent's disability, the trial court could consider that he contributed nothing toward Kathy's support and maintenance since 2014, despite having at least some income. Respondent testified that he earned additional income in 2016 and 2017 playing semi-professional football, that he declined a professional football contract worth $524,000.00 in 2018 to remain close to Kathy, and that he had been working full-time since June 2018, all while collecting SSDI benefits. Even without this finding, we conclude that the court would have reached the same conclusion about respondent's willful abandonment of Kathy.

monthly visitation in the 1 June 2016 custody order, respondent did not attend a single visit during the determinative time period; nor did respondent return to court to attempt to modify the terms of the custody order. The trial court also found that respondent "has always had the ability to visit the minor child, and knowingly and willing[ly] chose not to visit the minor child" and "not to have any contact with the minor child."

The trial court's findings show respondent's complete lack of involvement with Kathy, not only during the determinative six-month period, but dating back to 2014. We hold these facts support the court's ultimate findings that respondent acted willfully and with an intention to forego his parental responsibilities to Kathy. Having reviewed the trial court's evidentiary findings, we find no merit to respondent's arguments challenging the court's ultimate findings and conclusion that, by withholding his presence, love, care, and filial affection from Kathy, he willfully abandoned the minor child during the six months preceding petitioner's filing of the petition. Respondent's actions both prior to and during the determinative six-month period support a reasonable inference of willfulness for purposes of N.C.G.S. § 7B-1111(a)(7). *See In re E.H.P.*, 372 N.C. at 394, 831 S.E.2d at 53.

[2] While respondent challenges several of the court's evidentiary findings, each of these contested findings concern his actions outside the six-month period from 11 March 2017 to 11 September 2017. The evidence shows respondent began attending visitations at the Mediation Center on 6 January 2018, well outside the relevant time period. After his second hour-long visit with Kathy on 20 January 2018, respondent "discontinued" his participation in the Family Visitation Program and did not resume visitations until 28 April 2018.[4] Respondent's 28 April

4. Respondent informed the visitation monitor that he "w[ould] be out of town for several months starting 2/1/2018." Respondent testified that he was unable to visit Kathy during that period because he was pursuing a professional football career with the Miami Dolphins. The trial court made detailed findings to explain why it found respondent's testimony about his football career, and his whereabouts from January to May 2018, not credible. The Mediation Center's Client Services Coordinator confirmed to respondent by letter dated 24 January 2018 "that supervised visitation services between you and your minor child at the Family Visitation Program were discontinued effective January 20, 2018 . . . . at your request."

Respondent asserts the trial court erroneously implied a connection between an "incident" which occurred at his second visit with Kathy on 20 January 2018 and his decision to discontinue visitations from 20 January 2018 until 28 April 2018. The Mediation Center's records show no incident during this visit. The report from the 20 January 2018 visit shows only that respondent asked the staff to record that Kathy was transported to and from the visitation by petitioner's husband rather than petitioner. At respondent's

2018 visitation was cancelled because he attempted to bring his twelve-year-old daughter to the visit without permission. Thereafter and up to the time of the termination hearing, respondent attended all but two of his scheduled visitations, except for two visits cancelled by petitioner during this period. Respondent challenges the trial court's findings that the totality of his behavior with regard to visitations in 2018 "clearly demonstrate[s] to this Court his entire lack of interest in parenting [Kathy]" and "is entirely contrary to his testimony before this Court how pained he has been by not seeing the minor child" during the several preceding years.

There exists an evidentiary basis for the trial court's assessment that respondent's actions in 2018 did not demonstrate a commitment to parenting Kathy or an equivalent focus on the needs and well-being of the minor child. While the record shows respondent's visits with six-year-old Kathy were affectionate and positive, their activities together did not progress beyond playing video or board games. Regardless, any error in these findings is harmless and had no impact on the court's adjudication because they occurred in 2018 after the petition was filed and well outside the determinative time period. *See In re Beck*, 109 N.C. App. 539, 548, 428 S.E.2d 232, 238 (1993) (upholding trial court's adjudication of grounds to terminate parental rights for neglect where, "[i]f the erroneous finding is deleted, there remains an abundance of clear, cogent, and convincing evidence to support the finding of neglect").

Finally, respondent contends the trial court's mistaken reference to abandoned custody "claims" on 12 May 2015 erroneously suggests he also abandoned his claim for visitation with Kathy along with his custody claim. *See generally Clark v. Clark*, 294 N.C. 554, 575–76, 243 S.E.2d 129, 142 (1978) ("Visitation privileges are but a lesser degree of custody."). The trial court understood respondent's request for visitation. The termination order quotes the portion of the 1 June 2015 custody order that recognized respondent's visitation request and granted respondent twice monthly supervised visitation with Kathy. As discussed above, the trial court clearly based its adjudication decision on the fact that respondent "did not exercise his court ordered visitation with the minor a single time prior to the petition" being filed on 11 September 2017 rather than the custody proceedings in 2015.

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next scheduled visit on 28 April 2018, however, police were called to the Mediation Center after respondent refused to leave the premises and tried to enter an unauthorized area to locate Kathy. Regardless, the trial court could reasonably infer from defendant's prolonged absence from 20 January 2018 to 28 April 2018 that defendant willfully discontinued his twice monthly visitation rights.

[3] Having concluded that the trial court did not err in its adjudicatory findings and conclusions, we next consider respondent's contentions regarding the dispositional stage. At the dispositional stage, we review the trial court's conclusion that terminating a respondent's parental rights is in the child's best interest only for abuse of discretion. *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). The trial court's dispositional findings of fact are reviewed under a "competent evidence" standard. *See In re A.H.*, 250 N.C. App. 546, 565–66, 794 S.E.2d 866, 879–80 (2016), *disc. rev. denied*, 369 N.C. 562, 798 S.E.2d 749 (2017); *cf. Stephens v. Stephens*, 213 N.C App. 495, 503, 715 S.E.2d 168, 174 (2011) ("As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." (quoting *Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000)).

In determining a juvenile's best interest under N.C.G.S. § 7B-1110(a),

> [t]he court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a)(1)–(6).

The trial court made detailed dispositional findings addressing each of the factors in subsection 7B-1110(a). In addition to recounting

respondent's abandonment of Kathy "for years preceding the petition in this matter[,]" the findings describe the six-year-old child's resulting lack of bond with respondent as well as her strong bond with petitioner's husband, who has raised Kathy as his own child and hopes to adopt her. The court's findings portray Kathy as happy, well-loved, and thriving in her current home with petitioner, her husband, and their two-year-old son. The findings also note the opinion of Kathy's guardian *ad litem* (GAL) that it is in Kathy's best interest that respondent's rights be terminated. To the extent respondent does not contest these findings, he is bound thereby. *In re Z.L.W.*, 372 N.C. at 435–36, 831 S.E.2d at 65.

Respondent challenges the following dispositional findings as unsupported by competent evidence:

> c. . . . [T]he minor child is not certain who the Respondent Father is to her and does not consider him a part of her family.
>
> . . . .
>
> e. There is no bond between the juvenile and the Respondent Father.
>
> . . . .
>
> m. While the minor child indicated that she likes the visits with "Tony[,"] the competent evidence is that the minor child plays games with the Respondent Father during her visits, is a content and settled child, but has no bond with the Respondent Father.
>
> o. The conduct of the Respondent Father, as found above, demonstrates that said Respondent will not promote the minor child's physical and emotional well-being.

We agree with respondent that a certain degree of conflict may exist between the finding that Kathy does not view him as part of her family and the GAL's report that Kathy described respondent as "part of her family," even though she did not know how she was related to him. Petitioner testified Kathy had no memory of respondent when their visitations began in January 2018. Thereafter, Kathy told petitioner she liked the games she played during visits but had not otherwise expressed any feelings about respondent. Although the Mediation Center's records show that Kathy told petitioner she "got to see daddy" following her initial visit with respondent on 6 January 2018, the visitation monitor had referred to respondent as "[y]our dad" to Kathy at the beginning of

this visit. Records from subsequent visits show Kathy calling respondent by his first name, "Tony," despite respondent referring to himself as her "daddy" during the visits. After each of their two most recent visits on 26 September 2018 and 10 October 2018, respondent voiced his concern to the visitation monitor that Kathy continued to call him by his first name.

While the trial court found the lack of *any* bond between respondent and Kathy, the evidence supports a finding of no *parent-child* bond between them. The GAL's written report to the trial court, the visitation records of the Mediation Center, and petitioner's testimony largely support the contested findings. We find significant Kathy's statement to the GAL that "she had only one father[,]" petitioner's husband.

Competent evidence also supports the trial court's finding that respondent's conduct indicates he "will not promote [Kathy's] physical and emotional well-being" should he retain his parental rights. As the trier of fact, the trial court could reasonably draw this inference based on respondent's abandonment of his daughter over a period of several years before petitioner filed her petition to terminate his rights and his irregular attendance at visitations in response to petitioner's filing. As made plain in its findings, the court considered respondent's testimony about his prior conduct toward Kathy demonstrably false and self-serving. Based on this evidence, the court found respondent's averments "as to his future intentions with this minor child . . . not credible."

We hold the trial court did not abuse its discretion in concluding that Kathy's best interest would be served by the termination of respondent's parental rights. The court's findings demonstrate its careful consideration of the dispositional factors prescribed in N.C.G.S. § 7B-1110(a), including the strong bond between Kathy and petitioner's husband, his intention to adopt Kathy, and the loving home environment petitioner and her husband created for Kathy and their young son. That assessment accords with the GAL's recommendation that respondent's rights be terminated.

[4] Lastly, respondent cites a series of cases recognizing a presumption in favor of the child's biological parents in matters related to child custody. *See, e.g.*, *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994). Nonetheless, this reliance on *Petersen* and like cases in which the parents were not shown to have acted inconsistently with their constitutionally-protected status is unavailing. While this Court has long recognized "the constitutionally-protected paramount right of parents to custody, care, and control of their children," *id.* at 406, 445 S.E.2d at 905, it is also well-established, however, that "[a] parent loses

this paramount interest if he or she is found to be unfit or acts inconsistently 'with his or her constitutionally protected status,' " *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 503 (2010) (quoting *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005)). Once a parent has forfeited his constitutionally protected status, issues related to child custody are determined based purely on the child's best interests. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534–35 (1997).

An adjudication of grounds for terminating parental rights under N.C.G.S. § 7B-1111(a) constitutes a determination by the trial court that the respondent-parent is unfit or has acted inconsistently with his constitutionally protected status with regard to the subject juvenile. *See Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 267 (2003) (identifying an adjudication under N.C.G.S. § 7B-1111(a) as one of "at least two methods a court may use to find that a natural parent has forfeited his or her constitutionally protected status"). The dispositional statute thus provides that only "[*a*]*fter an adjudication that one or more grounds for terminating a parent's rights exist*, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (emphasis added).

Having adjudicated respondent's willful abandonment of Kathy under N.C.G.S. § 7B-1111(a)(7), the trial court was obliged by N.C.G.S. § 7B-1110(a) to determine whether it was in Kathy's best interests to terminate respondent's parental rights, and to do so without regard to any competing interest of respondent. *Cf. Owenby*, 357 N.C. at 146, 579 S.E.2d at 267 ("Once a court determines that a parent has actually engaged in conduct inconsistent with the protected status, the 'best interest of the child test' may be applied without offending the Due Process Clause."). The court undertook the appropriate statutory inquiry and reached a reasoned decision about Kathy's best interest based on the evidence. The trial court's order is affirmed.

AFFIRMED.

IN RE N.P.

[374 N.C. 61 (2020)]

IN THE MATTER OF N.P.

No. 227A19

Filed 3 April 2020

Termination of Parental Rights—grounds for termination—neglect—findings

The trial court did not err by determining that grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate the parental rights of a father who had numerous convictions for sex offenses against a child. Despite the father's claims to the contrary, the district court expressly made a specific ultimate finding that there was a high probability that repetition of neglect would occur in the future if the child were placed with his father. The trial court's findings were supported by clear, cogent, and convincing evidence.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 13 March 2019 by Judge Christopher B. McLendon, in District Court, Pitt County. This matter was calendared in the Supreme Court on 25 March 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

The Graham.Nuckols.Conner.Law Firm, PLLC, by Timothy E. Heinle, for petitioner-appellee Pitt County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Thomas N. Griffin III, for respondent-appellee Guardian ad Litem.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for respondent-appellant father.

MORGAN, Justice.

Respondent-father appeals from the district court's order terminating his parental rights to N.P. (Nick).[1] After careful consideration of

1. The minor child N.P. will be referenced throughout this opinion as "Nick," which is a pseudonym used to protect the identity of the child and to facilitate the ease of reading the opinion.

respondent's challenges to the district court's conclusion that grounds existed to terminate his parental rights, we affirm.

On 19 September 2016, the Pitt County Department of Social Services ("DSS") obtained non-secure custody of Nick and filed a petition alleging that he was a neglected and dependent juvenile. In the petition, DSS alleged that Nick tested positive for cocaine at birth and that his mother failed to bond with him. *In re N.J.P.*, No. COA17-532, 2017 WL 5147343 *1 (N.C. Ct. App. 2017) (unpublished). DSS further alleged that respondent "had a 'co-dependent relationship' with [the mother] and had 'served time in prison for Statutory Rape/Sex Offense and Sexual Exploitation of a Minor.' " *Id.* On 23 February 2017, the district court adjudicated Nick to be a neglected and dependent juvenile. *Id.* The Court of Appeals affirmed the adjudications of neglect and dependency, but reversed the disposition in part. *Id.* at *8–9.

On 27 November 2018, DSS filed a petition to terminate the parental rights of both respondent and Nick's mother. DSS alleged grounds to terminate respondent's parental rights to Nick based on neglect, willfully leaving Nick in foster care for more than 12 months without making reasonable progress to correct the conditions that led to Nick's removal, willfully failing to pay a reasonable portion of the cost of care for Nick during his placement in DSS custody, and dependency. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2019). On 13 March 2019, the district court entered an order concluding that grounds existed to terminate respondent's parental rights based on all of the grounds alleged in the petition. On the same date, the district court entered a separate order in which it concluded that termination of respondent's parental rights was in Nick's best interests.[2] Respondent appeals.

Before this Court, respondent argues that the district court erred by concluding that grounds existed to terminate his parental rights. We disagree.

A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under N.C.G.S. § 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(e), (f) (2019). We review a district court's adjudication

2. The district court order also terminated the parental rights of Nick's mother, but she did not appeal and is not a party to the proceedings before this Court.

"to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). If the petitioner meets its burden during the adjudicatory stage, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

N.C.G.S. § 7B-1111(a)(1) (2019) provides for termination of parental rights based upon a finding that "[t]he parent has . . . neglected the juvenile" within the meaning of N.C.G.S. § 7B-101. A neglected juvenile, in turn, is statutorily defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (2019).

Generally, when termination of parental rights is based on neglect, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019) (citing *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)).

Here, in the order terminating respondent's parental rights, the district court found as fact that Nick was adjudicated neglected on 5 January 2017. The district court then made more than ninety findings of fact relevant to its adjudication of grounds to terminate respondent's parental rights on grounds of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). For example, the district court found that, at the time of the adjudication, respondent: (1) had never acknowledged any responsibility for his May 2001 convictions on fourteen counts of sex offenses against a child and had not received sex-offender-specific treatment following those convictions; (2) did not timely complete a court-ordered Sex Offender Specific Evaluation, and when the SOSE was completed a year after Nick's initial adjudication as a neglected juvenile, did not complete the recommended therapy and training; (3) was evaluated in the SOSE as exhibiting paranoia and actively exhibited paranoia and lack of commitment in his therapy sessions with two counselors, leading to an unscheduled

discontinuation of both; (4) accused Sheriff Paula Dance of sexually abusing and kidnapping his other children, accused former Chief District Court Judge Gwen Hilburn of being mentally ill, and claimed "all parties involved in this proceeding have falsified documents"; (5) lacked stable housing as required by the district court in that one of the two residential options that respondent proposed would cause Nick and respondent to live with a registered sex offender and the second option would involve a prospective roommate for whom respondent was not able to provide any background information; (6) planned for said prospective roommate to be a caretaker for Nick and did not express an understanding of the "safety risk associated with inviting strangers into his home as potential babysitters," later "filed for a civil no-contact order against the roommate after an argument," and was eventually evicted from the residence; and (7) had repeatedly complained to DSS that Nick was suffering from physical and mental ailments from which Nick did not appear to be suffering and had contacted law enforcement during a supervised visit to report that DSS social workers were threatening respondent's life and Nick's life. The district court also found that:

> 69. The Respondent Father's history of instability, lack of being forthcoming about housing, poor housing and roommate decisions, and the fact that he waited until so long into the case and so soon to this TPR causes the [c]ourt not to find that he has stable housing now.
>
> 70. The Respondent Father has not had and does not now have stable housing. The Respondent Father's frequent relocating, his history of dishonesty and vague responses to questions about his housing, and his refusal or inability to properly vet roommates, contribute to this instability.
>
> . . .
>
> 91. The Respondent Father['s] inability to consistently follow court orders or work to resolve the issues which brought his child into DSS custody, as well as his history of poor decision-making, demonstrates that he is unable to maintain the juvenile's health and safety should the juvenile be placed in his care.
>
> 92. To place the juvenile with the Respondent Father would place the juvenile in an injurious environment as there have been no changes to the Respondent Father's mental health issues.

Overall, respondent does not make specific challenges to the district court's findings of fact, instead lodging a broadside exception that the evidentiary findings relating to the ground of neglect are not supported by the record. Such broadside exceptions, however, are ineffectual, and findings of fact not specifically challenged by a respondent are presumed to be supported by competent evidence and binding on appeal. *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) ("Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." (citations omitted)). Moreover, we review only those findings necessary to support the district court's conclusion that grounds existed to terminate respondent's parental rights for neglect. *Id.* at 407, 831 S.E.2d at 58–59 (citing *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133).

Of the findings of fact generally and noteworthily referenced above, the only findings specifically challenged by respondent which are relevant to the ground of neglect are Findings of Fact 69 and 70, which relate to respondent's history of unstable housing. Respondent contends that these findings of fact were based on events occurring in the past and do not reflect his status as of the date of the termination hearing. We disagree, noting that respondent does not challenge any of the findings which describe his history of unstable housing and poor decisions regarding housing and roommates. The district court has the responsibility of making all reasonable inferences from the evidence presented. *See In re D.L.W.*, 368 N.C. at 788 S.E.2d at167–68 (stating that it is the district court judge's duty to consider all of the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom). The district court could reasonably infer from the evidence that respondent could not maintain safe housing for any appreciable period of time and that he lacked the ability to do so in the future. *See*, *e.g.*, *In re Wilkerson*, 57 N.C. App. 63, 68, 291 S.E.2d 182, 185 (1982) (rejecting respondents' argument that they had corrected the conditions which led to the removal for neglect, indicating that at the time of the termination hearing they were no longer living in a rat-infested trailer but in a clean five-room apartment, but ignoring the preponderance of the evidence that they had lived in filthy and unsanitary conditions until shortly before the termination hearing).

Respondent generally contends that the trial court erred by finding and concluding that he neglected Nick and that such neglect was likely to reoccur. Respondent also asserts that he had alleviated the conditions of neglect that led to Nick's removal. He further claims that the district

court failed to make a specific finding regarding the probability of repetition of neglect. We are not persuaded.

The district court's undisputed findings of fact demonstrate that respondent was convicted for sexually abusing children and denied responsibility for those convictions; had persistent and serious mental health issues that affected his ability to parent Nick; and suffers from serious paranoia, impulsivity, and erratic behavior. The district court further determined that these issues impeded and impacted respondent's ability to parent Nick, and that placing Nick with respondent would put Nick in an injurious environment. Although respondent attempts to portray his behavior as being protective of Nick, the district court, which had repeated opportunities to observe respondent, rejected that depiction, and it is not the role of this Court to substitute its judgment for that of the trier of fact. *See*, *e.g.*, *Scott v. Scott*, 157 N.C. App. 382, 388, 579 S.E.2d 431, 435 (2003) (stating that when the trial court sits as fact-finder, it is the sole judge of the credibility and weight to be given to the evidence, and it is not the role of the appellate court to substitute its judgment for that of the trial court). Additionally, it is clear that respondent lacked stable housing until shortly before the termination hearing. Furthermore, despite respondent's claims to the contrary, the district court expressly made a specific ultimate finding that "there is a high probability that a repetition of neglect would occur in the future if [Nick] were to be placed with the Respondent Father." The district court's findings on this issue are supported by clear, cogent, and convincing evidence; as a result, we hold that the district court did not err by determining that grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate respondent's parental rights.

The district court's conclusion that a ground for termination existed pursuant to N.C.G.S. § 7B-1111(a)(1) is sufficient in and of itself to support termination of respondent's parental rights. *In re T.N.H.*, 372 N.C. at 413, 831 S.E.2d at 62. Furthermore, respondent does not challenge the trial court's conclusion that termination of his parental rights was in the child Nick's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the district court's order terminating respondent's parental rights.

AFFIRMED.

IN RE S.D.

[374 N.C. 67 (2020)]

IN THE MATTER OF S.D.

No. 150A19

Filed 3 April 2020

Termination of Parental Rights—grounds—neglect—findings—conclusions

In a proceeding to terminate a father's parental rights based on neglect, the trial court made detailed findings of fact, supported by competent evidence, that the child was previously adjudicated neglected and that the father had not made sufficient progress toward completing the requirements of his case plan to enable reunification to occur. The findings were sufficient to support the trial court's conclusion that the child was neglected in the past and that there was a likelihood of repetition of neglect given the father's history of criminal activity and substance abuse, his lack of progress in correcting the barriers to reunification, and his inability to provide care for his child at the time of the termination hearing.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 2 January 2019 by Judge Louis A. Trosch in District Court, Mecklenburg County. This matter was calendared for argument in the Supreme Court on 25 March 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Gretchen L. Caldwell, Associate County Attorney, for petitioner-appellee Mecklenburg County Department of Social Services, Youth & Family Services Division.

K&L Gates, LLP, by Sophie Goodman, for Guardian ad Litem.

Mercedes O. Chut for respondent-appellant father.

ERVIN, Justice.

Respondent-father Jonathan K. appeals from an order entered by the trial court terminating his parental rights in his minor child, S.D.[1] After careful consideration of respondent-father's challenges to the trial

1. S.D. will be referred to throughout the remainder of this opinion as "Sarah," which is a pseudonym used to protect the identity of the juvenile and for ease of reading.

court's termination order in light of the record and the applicable law, we conclude that the trial court's termination order should be affirmed.

In September 2016, the Mecklenburg County Department of Social Services, Youth and Family Services Division assumed responsibility for addressing concerns that Sarah might be a neglected juvenile from the Gaston County Department of Social Services. At that time, Sarah was in a kinship placement with a maternal great-aunt as the result of substance abuse and mental health problems involving her mother and her mother's boyfriend. After Sarah's mother tested positive for methamphetamines at the time that she gave birth to Sarah's half sibling on 30 November 2016, YFS filed a juvenile petition alleging that Sarah was a neglected and dependent juvenile and obtained nonsecure custody of her on 2 December 2016.[2] Sarah's placement with her great-aunt continued after she was taken into YFS custody.

At the time that YFS filed the juvenile petition and obtained nonsecure custody of Sarah, respondent-father was incarcerated in the custody of the Division of Adult Correction based upon convictions for possession of a firearm by a felon and felony drug-related offenses. Although YFS noted that respondent-father was Sarah's father in the juvenile petition, it also alleged that "[p]aternity ha[d] not been established" and that "[respondent-father] ha[d] never seen [Sarah] nor ha[d] he provided any financial or emotional support to her." When a YFS social worker visited respondent-father in prison on 31 January 2017, respondent-father acknowledged that he had a history of substance abuse, requested paternity testing, and expressed a willingness to enter into a case plan and participate in remedial services in the event that he was determined to be Sarah's biological father. In the aftermath of this meeting, YFS proposed an initial Out-of-Home Family Services Agreement, pursuant to which respondent-father would be required, among other things, to complete an assessment through the Families in Recovery Stay Together program, maintain sobriety, follow any recommendations resulting from the FIRST assessment, maintain consistent contact with YFS and Sarah's guardian ad litem, complete parenting education, and demonstrate the skills that he had learned during parenting education in the course of his interactions with Sarah.

The juvenile petition came on for hearing before Judge David H. Strickland on 15 February 2017. Paternity of Sarah had not been established by the time of the hearing. In light of an agreement between the

2. The juvenile petition also addressed the status of Sarah's newborn half sibling, who is not respondent-father's child.

parties, which included stipulations to the existence of certain facts and indicated that "[respondent-father] ha[d] never seen [Sarah] nor ha[d] he provided any financial or emotional support to her[,]" Judge Strickland entered an order on 27 February 2017 in which he adjudicated Sarah to be a neglected and dependent juvenile, ordered that Sarah remain in YFS custody, and established reunification as the primary permanent plan, with adoption and guardianship being the concurrent secondary plan.

On 28 February 2017, respondent-father submitted to DNA testing. In addition, respondent-father was present for the first permanency planning review hearing on 11 May 2017 despite his continued incarceration. In the review hearing order that resulted from the 11 May 2017 hearing, Judge Strickland determined that respondent-father was Sarah's biological father based upon the results of the DNA test; ordered that respondent-father contact YFS immediately after his release in September 2017 so that he could begin working on his case plan; authorized respondent-father to send mail or gifts to Sarah through YFS, and noted that Sarah's great-aunt had authorized respondent-father to call her for the purpose of inquiring about Sarah's well-being.

Respondent-father sent a birthday card to Sarah prior to the next review hearing, which was held on 25 August 2017. In a review order entered on 18 September 2017, Judge Strickland established a plan under which respondent-father was allowed to visit with Sarah for two hours each week following his release from his incarceration in the event that he had demonstrated his ability to maintain sobriety by providing a clean drug screen to YFS. In addition, Judge Strickland changed Sarah's permanent plan to a primary plan of adoption and a concurrent secondary plan of legal guardianship and reunification on the grounds, among others, that respondent-mother had failed to make progress in satisfying the requirements of her case plan and the fact that respondent-father had remained incarcerated since the filing of the juvenile petition.

Respondent-father was released from prison on 21 September 2017. Between the date of his release and the next review hearing on 20 December 2017, respondent-father contacted YFS for the purpose of setting up a meeting to develop his case plan and to initiate a visitation program. However, respondent-father failed to appear on four scheduled meeting dates in October before finally meeting with a YFS representative on 21 November 2017. Although respondent-father expressed hesitation about participating in the case plan process, he agreed to complete a FIRST assessment. In spite of this agreement, respondent-father failed to complete the required FIRST assessment prior to the 20 December 2017 review hearing and had no further contact with YFS

in advance of that hearing aside from a text message that he transmitted to a social worker on the date of the hearing indicating that he would be unable to attend. Similarly, even though respondent-father had contacted the maternal great-aunt on three separate occasions to set up a visit with Sarah, he never actually visited with his daughter.

In the order entered following the 20 December 2017 review hearing on 26 January 2018, the trial court ordered respondent-father to comply with the case plan that had been proposed by YFS, to obtain stable housing and employment, and to consistently visit with Sarah. In spite of the fact that it determined that respondent-father had failed to make significant progress toward complying with the provisions of his case plan, the trial court concluded that the initiation of a termination of parental rights proceeding at that time would not be in Sarah's best interests and determined that respondent-father should be afforded "one more short review period to demonstrate significant progress . . . towards reunification." As a result, the trial court ordered respondent-father to "immediately demonstrate his commitment to reunifying with [Sarah] by taking affirmative action to comply with his case plan."

Although respondent-father visited with Sarah shortly after the 20 December 2017 review hearing, he otherwise failed to make significant progress toward satisfying the requirements of his case plan prior to the next review hearing, which was set for 20 February 2018. On the contrary, respondent-father was arrested for an alleged parole violation on 7 February 2018 and remained in custody until 12 February 2018. In view of the fact that respondent-father had failed to make significant progress in satisfying the provisions of his case plan by the time of the 20 February 2018 review hearing, the trial court concluded in the resulting order that termination of respondent-father's parental rights would be in Sarah's best interests and ordered YFS to make a filing seeking the termination of his parental rights in Sarah within the next sixty days. On the other hand, the trial court did not suspend efforts to reunify Sarah with respondent-father and allowed respondent-father to continue to visit with Sarah on the condition that, prior to his next visit, he provide a clean drug screen and meet with YFS for the purpose of discussing the provisions of his case plan. On 30 April 2018, YFS filed a motion seeking to have respondent-father's parental rights in Sarah terminated on the grounds of neglect and willfully leaving her in foster care or a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that had led to her removal from the home. N.C.G.S. § 7B-1111(a)(1) and (2) (2019).[3]

3. The YFS filing also sought to terminate the mother's parental rights in Sarah and the parental rights of the mother and the mother's boyfriend in Sarah's half sibling.

On 14 May 2018, respondent-father was arrested for possession of heroin, possession of methamphetamine, and possession of drug paraphernalia. In addition, respondent-father was charged with violating the terms and conditions of his parole on 15 May 2018 as a result of the fact that these new criminal charges had been lodged against him. Respondent-father remained incarcerated in connection with these new charges until he entered a plea of guilty to them on 5 September 2018, received a suspended sentence, and was released on probation.

After a continuance from a 25 July 2018 hearing date resulting from respondent-father's incarceration, another review hearing was held on 12 September 2018. On 21 November 2018, the trial court entered a review order finding that respondent-father had failed to make sustained efforts to comply with the provisions of his case plan or to make significant progress toward reunification with Sarah. In view of his failure to satisfy the requirements that had been established as a prerequisite for the reinstatement of visitation, respondent-father had not had any additional visits with Sarah as of that date.

The motion to terminate respondent-father's parental rights came on for hearing before the trial court on 12 December 2018.[4] On 2 January 2019, the trial court entered an order terminating respondent-father's parental rights in Sarah on both of the grounds alleged in the termination motion. The trial court further concluded that the termination of respondent-father's parental rights in Sarah would be in the child's best interests. Respondent-father noted an appeal to the Court of Appeals from the trial court's order.[5]

In seeking relief from the trial court's termination order before this Court, respondent-father argues that the trial court erred by determining

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4. Although the motion that YFS had filed sought to terminate the rights of the parents in both Sarah and her half sibling, the 12 December 2018 hearing was limited to a consideration of the issue of whether respondent-father's parental rights in Sarah should be terminated. The hearing concerning the termination of the mother's rights in Sarah was continued after the mother executed a relinquishment of her parental rights in Sarah on 7 December 2018, *see* N.C.G.S. §§ 48-3-701, 48-3-706 (2017), with this aspect of the termination proceeding being subsequently dismissed after the time within which the mother was entitled to revoke the relinquishment of her parental rights in Sarah had expired. The termination proceeding regarding Sarah's half sibling was dismissed by YFS after a guardian had been appointed for Sarah's half sibling.

5. Although respondent-father's notice of appeal specifies that his appeal had been noted to the Court of Appeals, rather than to this Court, we elect, in the exercise of our discretion, to issue a writ of certiorari authorizing review of respondent-father's challenges to the trial court's termination order on the merits in the exercise of our discretion given the seriousness of the issues that are implicated by the trial court's termination order. *In re N.D.A.*, 373 N.C. 71, 73–74, 833 S.E.2d 768, 771 (2019).

that his parental rights in Sarah were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). According to well-established North Carolina law, termination of parental rights proceedings are conducted utilizing a two-stage process. N.C.G.S. §§ 7B-1109, -1110 (2019). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6, 832 S.E.2d 698, 700 (2019) (quoting N.C.G.S. § 7B-1109(f) (2017)). "If [the trial court] determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110). "This Court reviews a trial court's adjudication decision pursuant to N.C.G.S. § 7B-1109 'in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law,' with the trial court's conclusions of law being subject to de novo review on appeal." *In re N.D.A.*, 373 N.C. 71, 73, 833 S.E.2d 768, 771 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citation omitted)). Findings of fact that are not challenged on appeal on the grounds that they lack sufficient evidentiary support are binding for purposes of appellate review. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

In his initial challenge to the trial court's termination order, respondent-father argues that the trial court erred by concluding that his parental rights in Sarah were subject to termination on the grounds of neglect.

> According to N.C.G.S. § 7B-1111(a)(1), a trial court has the authority to terminate a parent's parental rights in a child in the event that the parent has neglected the child as that term is defined in N.C.G.S. § 7B-101, which provides that a neglected juvenile is, among other things, a juvenile who "does not [receive] proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned."

In re N.D.A., 373 N.C. at 79–80, 833 S.E.2d at 774–75 (quoting N.C.G.S. § 7B-101(15)). As the Court of Appeals has recognized, "[n]eglect is more than a parent's failure to provide physical necessities and can include the total failure to provide love, support, affection, and personal contact."

In re C.L.S., 245 N.C. App. 75, 78, 781 S.E.2d 680, 682 (citation omitted), *aff'd per curiam*, 369 N.C. 58, 791 S.E.2d 457 (2016).

> "[I]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " In the event that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, 'requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible.' " In such circumstances, the trial court may find that a parent's parental rights in a child are subject to termination on the grounds of neglect in the event that the petitioner makes "a showing of past neglect and a likelihood of future neglect by the parent."

In re N.D.A., 373 N.C. at 80, 833 S.E.2d at 775 (citations omitted). "If past neglect is shown, the trial court also must then consider evidence of changed circumstances." *In re M.A.W.*, 370 N.C. 149, 152, 804 S.E.2d 513, 516 (2017) (citing *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

After noting that it had received its orders in the underlying neglect and dependency case into evidence without objection, the trial court made detailed findings of fact based upon those orders and the testimony that had been received at the termination hearing. Among other things, the trial court found in Finding of Fact No. 15 that Sarah had been adjudicated to be a neglected and dependent juvenile on 15 February 2017 and determined in Finding of Fact No. 16 that YFS had proposed an initial case plan for the purpose of addressing the barriers to reunification between respondent-father and Sarah which, in the trial court's opinion, consisted of substance abuse, mental health, and respondent-father's lack of stable housing and employment. In Finding of Fact Nos. 17 through 56, the trial court delineated respondent-father's progress, or lack thereof, in addressing those barriers to reunification between the date upon which Sarah had been adjudicated to be a neglected and dependent juvenile and the date of the final review hearing, which had been held on 12 September 2018. In Finding of Fact Nos. 57 through 73, the trial court addressed the extent to which respondent-father had addressed the barriers to reunification between the date of

the 12 September 2018 review hearing and the date of the 12 December 2018 termination hearing. According to the trial court's findings of fact, respondent-father (1) never made significant, sustained progress toward addressing the barriers to his reunification with Sarah; (2) had not established a relationship with Sarah; and (3) only desired to have contact and visit with Sarah instead of obtaining custody of her.

Based upon these findings of fact, the trial court concluded that respondent-father's parental rights in Sarah were subject to termination for neglect. *See* N.C.G.S. § 7B-1111(a)(1). More specifically, the trial court determined in Conclusion of Law No. 8 that, "[p]ursuant to N.C.G.S. §[ ]7B-1111(a)(1), [respondent-father] has neglected the juvenile as that term is defined in N.C.G.S. §[ ]7B-101(15) in that he has failed to provide proper care, supervision or discipline for the juvenile" and further determined in Conclusion of Law No. 9 "that the likelihood of ongoing or continued neglect in the future is significantly high if the juvenile is returned to [respondent-father's] care." The trial court explained the rationale underlying the second of these two determinations in Conclusion of Law No. 9, stating that:

> [Respondent-father] has made almost no effort to establish a relationship with [Sarah], even in the 14 months since he was released from prison. He has continued to engage in criminal activity since his release from prison, resulting in incarceration and unavailability to [Sarah]. Additionally, even when not incarcerated, [respondent-father] hasn't complied with his case plan services specifically identified to address the barriers to reunification . . . .

In challenging the trial court's determination that his parental rights in Sarah were subject to termination on the grounds of neglect, respondent-father begins by asserting that many of the trial court's findings of fact lacked sufficient evidentiary support or were otherwise erroneous. More specifically, respondent-father contends that a number of the trial court's findings were inaccurate and misleading given that he was not responsible for the conditions that led to Sarah's placement in YFS custody; that he lacked sufficient time to make adequate progress in complying with his case plan given that he had been incarcerated for fourteen months of the two-year interval between the date upon which Sarah was taken into YFS custody and the date of the termination hearing; and that YFS had failed to make adequate efforts to assist him in addressing the problems that he faced during the relevant time period. In addition, respondent-father has identified various findings of fact that he claims to be erroneous on the grounds that they fail to

account for the progress that he had made in addressing the obstacles to his reunification with Sarah prior to the date of the termination hearing. We are not persuaded by any of respondent-father's challenges to the trial court's findings of fact.

As an initial matter, we note that respondent-father's contention that the trial court erred by finding that his parental rights were subject to termination on the grounds of neglect because he was not responsible for the conditions that resulted in Sarah's placement in YFS custody is devoid of merit. Simply put, there is no requirement that the parent whose rights are subject to termination on the grounds of neglect be responsible for the prior adjudication of neglect. As we have previously explained, "[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re M.A.W.*, 370 N.C. at 154, 804 S.E.2d at 517 (quoting *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252). In light of that fact, we held in *In re M.A.W.* that a prior adjudication of neglect based upon a mother's substance abuse and mental health problems was "appropriately considered" by the trial court as "relevant evidence" in determining whether the parental rights of a father who had been incarcerated at the time of the initial adjudication should be terminated. *Id.* at 150–54, 804 S.E.2d at 515–17; *see also In re C.L.S.*, 245 N.C. App. at 78–79, 781 S.E.2d at 682–83 (affirming the termination of a father's parental rights on the grounds of neglect even though the father had been incarcerated and paternity had not been established at the time that the juvenile was adjudicated to be neglected based, in part, upon the mother's substance abuse problems). Moreover, we note that the determination that Sarah was a neglected and dependent juvenile rested, in part, upon findings that respondent-father's "[p]aternity ha[d] not been established" and that "[respondent-father] ha[d] never seen [Sarah] nor ha[d] he provided any financial or emotional support to her."

Respondent-father's contention that he had not been given an adequate opportunity to satisfy the requirements of his case plan prior to the termination of his parental rights in Sarah because he had been in prison for approximately fourteen months of the two-year period during which Sarah had been in YFS custody is equally unpersuasive. This Court and the Court of Appeals have both emphasized that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision[,]" *In re T.N.H.*, 372 N.C. 403, 412, 831 S.E.2d 54, 62 (2019) (quoting *In re M.A.W.*, 370 N.C. at 153, 804 S.E.2d at 517), and that incarceration

> "does not negate a father's neglect of his child" because "[t]he sacrifices which parenthood often requires are not forfeited when the parent is in custody." Thus, while incarceration may limit a parent's ability "to show affection, it is not an excuse for [a parent's] failure to show interest in [a child's] welfare by whatever means available . . . ."

In re C.L.S., 245 N.C. App. at 78, 781 S.E.2d at 682 (quoting *Whittington v. Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003)). As the record reflects, respondent-father had been incarcerated for approximately ten months between the time that YFS obtained nonsecure custody of Sarah on 2 December 2016 and the date of his release on 21 September 2017, which, in turn, occurred approximately fourteen months prior to the date of the 12 December 2018 termination hearing. In addition, respondent-father had been incarcerated for a brief period of time in February 2018 based upon an alleged parole violation and for the period between 14 May 2018 and 6 September 2018 as the result of the fact that he had been charged with committing new drug-related offenses. The evidentiary record developed in this case shows that respondent-father made minimal efforts to show interest in Sarah while incarcerated, sending just a single birthday card to her after the trial court advised him that "he may send any mail or gifts to [Sarah] through the social worker" and after YFS encouraged him to do so. Moreover, even though respondent-father had been unable to engage in the full range of remedial services required by his case plan during the first of these multiple periods of incarceration,[6] his own conduct led to this aspect of his inability to attempt to satisfy the requirements of his case plan in 2018. As the trial court recognized in Conclusion of Law No. 9, respondent-father's continued criminal activity and the resulting separation from Sarah justifies, rather than undercuts, the trial court's determination that there was a significant likelihood that Sarah would be neglected in the event that she was returned to respondent-father's

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6. Although respondent-father asserts that he made progress toward satisfying the requirements of his case plan while incarcerated because, "during his first incarceration, [he] earned his high school equivalency diploma and completed a college course in computer technology[, which] furthered his case plan goal of obtaining gainful employment after incarceration," the trial court specifically found that "[those] courses were completed prior to [Sarah] entering YFS custody[ ] and were not related to his case plan objectives." In view of the fact that respondent-father has not challenged this finding of fact as lacking sufficient evidentiary support, it is binding upon this Court for purposes of appellate review. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

care. As a result, the trial court did not err in the manner in which it addressed respondent-father's incarceration and the extent of his ability to satisfy the requirements of his case plan in the process of finding that his parental rights in Sarah were subject to termination on the basis of neglect.

Finally, respondent-father faults YFS for not doing enough to assist him in satisfying the requirements of his case plan. More specifically, respondent-father argues that YFS did not maintain contact with him, failed to recommend specific services that would be of assistance to him in addressing the problems that prevented his reunification with Sarah, and made minimal attempts to assess his progress in satisfying the requirements of his case plan after his release from incarceration on 6 September 2018. The evidentiary record developed in this case undercuts the validity of this aspect of respondent-father's argument.

In each of the review orders entered while Sarah was in YFS custody, the trial court found, as required by N.C.G.S. § 7B-906.2(c), that YFS had made reasonable efforts to eliminate the conditions that had led to Sarah's removal from the family home. In addition, the record, as reflected in the trial court's findings of fact, establishes that respondent-father, rather than YFS, was responsible for his failure to satisfy the requirements of his case plan. According to the record evidence, a representative of YFS met with respondent-father for the purpose of discussing his case plan on at least four separate occasions while he was in prison and met with him on one other occasion following his release from incarceration in September 2017. During those meetings, the YFS representative emphasized the importance of respondent-father's case plan and the need for respondent-father to complete a FIRST assessment in order to ensure the development of an appropriate case plan. In spite of these admonitions, respondent-father never obtained the required FIRST assessment.

In addition, respondent-father failed to immediately contact YFS upon his release from incarceration in September 2018, despite having been instructed to do so and his commitment to YFS representatives that he would comply with this instruction. Respondent-father missed or canceled numerous meetings with YFS representatives throughout the time that Sarah was in YFS custody and provided minimal verification of the claim that he made at the termination hearing to have been making progress toward complying with the requirements of his case plan. Although respondent-father argues that the trial court placed an undue emphasis upon the importance of the requirement that he complete a

FIRST assessment,[7] the evidentiary record and the trial court's findings establish that the FIRST assessment was an integral component of respondent-father's case plan that was intended to identify the barriers to his reunification with Sarah, including his difficulties with substance abuse, mental health, physical health, and parenting skills, and to allow YFS to recommend suitable services to assist respondent-father in addressing those barriers to reunification with Sarah. As a result, the trial court's determination in Finding of Fact No. 65 that respondent-father's "failure to consistently respond to, or engage with, [YFS] and recommended services limited [YFS's] ability to assist him" is supported by ample record evidence and precludes acceptance of respondent-father's argument that YFS failed to make reasonable efforts to assist him in overcoming the barriers to reunification that he needed to address.

Aside from these more generalized complaints, respondent-father asserts that Finding of Fact Nos. 33–35, 37, 41–44, 46, 48, 53–55, and 58–73 are erroneous or misleading. As a general proposition, respondent-father refrains from asserting that these findings of fact lack sufficient evidentiary support, an argument that would be unavailing given that they are clearly based upon these review orders and the evidentiary record developed at the termination hearing. Instead, respondent-father advances challenges to these findings on a collective rather than an individual basis,[8] arguing, primarily, that the findings fail to account for the progress that he had made in completing the requirements of his case plan during the period immediately preceding the 12 December 2018 termination hearing. In reviewing respondent-father's challenges to the trial court's findings of fact, we will focus upon those findings that are necessary to support the trial court's determination that respondent-father's parental rights in Sarah are subject to termination on the grounds of neglect, *see In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58–59,

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7. The arguments made by respondent-father with respect to the FIRST assessment strike us as being inconsistent. At various points, respondent-father claimed that he did not need to complete the FIRST assessment because he did not have a substance abuse problem, that the FIRST assessment was unnecessary because he had enrolled in substance abuse treatment, and that the FIRST assessment was part of the parenting education component of his case plan.

8. For example, respondent-father asserts that "nearly all" of Finding of Fact Nos. 58–73 are erroneous because they "recite the same themes: [respondent-father] made no progress on his case plan; he failed to engage in his case plan and work with YFS or the [guardian ad litem]; he failed to communicate with YFS and the [guardian ad litem] for long periods; he never demonstrated any commitment to Sarah or any genuine interest in reuniting with her; he only attended Cornerstone [Treatment Program] because he was court-ordered and never successfully completed it; he refused substance abuse treatment because he never obtained a FIRST assessment."

while remaining mindful that this Court's role is to determine whether the trial court's findings are supported by clear, cogent, and convincing evidence, *see In re N.D.A.*, 373 N.C. at 74, 833 S.E.2d at 771, and that we should avoid any sort of appellate reweighing of the evidence.

According to the trial court, it was likely that Sarah would be neglected if she was returned to respondent-father's care because respondent-father had "made almost no effort to establish a relationship with [Sarah], even in the 14 months since he was released from prison." In support of this determination, the trial court found as a fact that:

> 70. Since [Sarah] entered YFS custody, [respondent-father] has not made himself available to the child to provide the care, personal contact, love, and affection that inheres in the parental relationship.
>
> 71. [Respondent-father] has only attended two visits with [Sarah] over the life of this case, despite visitation arrangements being in place and the father being encouraged to set them up with [the maternal great-aunt]. Prior to [Sarah] entering custody, [respondent-father] had not had any contact with [Sarah].
>
> 72. [Respondent-father] has not provided any gifts to [Sarah] over the life of this case. He sent one birthday card to [Sarah] through [YFS] in 2017.
>
> 73. The first step for any parent towards reunification with their child is to acknowledge that they are ready and willing to reunify with the juvenile. Over the life of this case, [respondent-father] has never indicated his willingness, ability, and intention to reunify with [Sarah]. He has clearly and consistently stated that he does not want full custody of [Sarah]. . . . [Respondent-father] has stated that he would like the maternal great[-]aunt to be granted guardianship of [Sarah]. [Respondent-father] has never identified any alternative placement options for [Sarah].

Respondent-father's contentions to the contrary notwithstanding, each of these findings has ample evidentiary support and accurately depicts the relevant record evidence.

As far as Finding of Fact No. 71, which addresses the issue of visitation, is concerned, the record evidence shows that, prior to his initial release from incarceration, respondent-father was authorized to

visit with Sarah on the condition that he provide a clean drug screen. According to the order entered following the 20 December 2017 review hearing and the testimony elicited at the termination hearing, respondent-father did not visit with Sarah until shortly after the 20 December 2017 review hearing, even though such visits had been authorized on 21 November 2017 after he provided two negative drug screens. In spite of respondent-father's suggestion that YFS had failed for over a month after his visits with Sarah had been approved to arrange for his first visit with Sarah, the record evidence shows that respondent-father had been advised to contact the maternal great-aunt directly in order to schedule visits and that respondent-father had failed to follow up with the great-aunt for the purpose of making the necessary arrangements after an initial exchange of text messages. In addition, the record contains evidence tending to show that, even though respondent-father's visitation plan was still in place at the time of the 20 February 2018 review hearing, which was held after respondent-father had been arrested for violating the terms and conditions of his parole, his visitation with Sarah had been suspended until respondent-father provided a negative drug screen and met with representatives of YFS. Moreover, the record reflects that respondent-father's visits with Sarah were not reinstated until his case plan was updated on 29 November 2018. Respondent-father had a second visit with Sarah on 1 December 2018. In confirmation of this evidence, respondent-father testified at the termination hearing that he had had two visits with Sarah since his release from incarceration in September 2017. As a result, we have no difficulty in holding that Finding of Fact No. 71 has ample record support.

The record also provides adequate support for Finding of Fact No. 72. Finding of Fact No. 72 is supported by unchallenged Finding of Fact Nos. 20 and 22, which provide that "[t]he [c]ourt advised [respondent-father at the 11 May 2017 review hearing] that he may send any mail or gifts to [Sarah] through the social worker," that "[his social worker] encouraged [him] to do so[,]" and that respondent-father had "sent [Sarah] a birthday card [prior to the 25 August 2017 review hearing]." In spite of the fact that respondent-father claimed to have sent a money order to the maternal great-aunt in November 2018 and that he was planning to send another money order to the great-aunt and Christmas gifts to Sarah in December 2018, there is no evidence in the record confirming that respondent-father sent the initial money order nor any indication that respondent-father had sent the other money order and gifts prior to the termination hearing. As a result, we are unable to accept respondent-father's challenge to the sufficiency of the record support for Finding of Fact No. 72.

Finding of Fact No. 73 has ample evidentiary support, as well. In spite of respondent-father's expressed desire to have contact with, and visit with Sarah, the findings of fact contained in the review orders and the testimony delivered by the social workers at the termination hearing demonstrate that respondent-father initially expressed uncertainty concerning the extent to which he wished to attempt to comply with a case plan, that he was worried about being accused of misconduct in the event that he cared for Sarah by himself, and that he was uncertain about his ability to care for Sarah without "an old lady" to help. Subsequently, respondent-father stated that he wanted the maternal great-aunt to have legal guardianship of Sarah. Finally, the social worker with responsibility for this matter at the time of the termination hearing testified that, since she had been assigned to work with Sarah on 24 September 2018, respondent-father had never asked that Sarah be placed in his care and had, instead, indicated that "he does not want custody of [Sarah]" and "just wants to remain in her life and have visits with her." As a result, for all of these reasons, we hold that Finding of Fact Nos. 71 through 73 are supported by clear, cogent, and convincing evidence and buttress the trial court's ultimate finding that respondent-father "ha[d] not made himself available to the child to provide the care, personal contact, love, and affection that inheres in the parental relationship."

In addition, the trial court determined that there was a likelihood of future neglect in the event that Sarah was returned to respondent-father's care because respondent-father "ha[d] continued to engage in criminal activity since his release from prison, resulting in incarceration and unavailability to [Sarah]." The trial court found in Finding of Fact No. 43 that respondent-father had been incarcerated from 7 February 2018 to 12 February 2018 for a parole violation and found in Finding of Fact Nos. 50, 53, and 54 that respondent-father had been arrested and held in pretrial detention based upon new drug-related charges, for which he was ultimately convicted, from 14 May 2018 to 6 September 2018. Although respondent-father challenged the validity of these findings of fact, the only argument that he has advanced in support of this contention rests upon the assertion that the trial court had erroneously described the sentence that had been imposed upon him in connection with these convictions for the three new drug-related charges.

According to Finding of Fact Nos. 53 and 54, respondent-father entered pleas of guilty to and was convicted of possession of heroin, possession of methamphetamine, and possession of drug paraphernalia on 5 September 2018; was sentenced to a suspended term of six to seventeen months imprisonment and placed on supervised probation for a period

of thirty months on the condition that he complete the Cornerstone Treatment Program; was released from jail on 6 September 2018 into the custody of the Cornerstone Treatment Program in accordance with the terms and conditions of his probation; and failed to contact YFS prior to the 12 September 2018 review hearing. Although the judgment that was entered based upon respondent-father's drug-related convictions was not admitted into evidence, respondent-father testified that he had pleaded guilty to the drug-related charges identified in Finding of Fact No. 53 on 5 September 2018 and had received a six to seventeen month suspended sentence. In spite of the fact that respondent-father claimed that he had "chose[n] to go" to the Cornerstone Treatment Program and expressed uncertainty about whether he had been ordered to enroll in and complete that program, he also testified that he "was court-ordered to stay [at the Cornerstone Treatment Program]" and had been "ordered only to be released to the Cornerstone Treatment Program." Thus, we hold that the record contains sufficient evidence to support the trial court's essential findings concerning the nature of defendant's drug-related convictions and the sentence that was imposed upon him in light of those convictions.

Finally, the trial court determined that there was a likelihood of future neglect in the event that Sarah was returned to respondent-father's care on the grounds that, "even when not incarcerated, [respondent-father] hasn't complied with his case plan services specifically identified to address the barriers to reunification." The trial court's conclusion to this effect is supported by Finding of Fact Nos. 66 and 69, which state that, "[a]t the time of the [termination h]earing, [Sarah] ha[d] remained in YFS custody for a period of two years"; that respondent-father "ha[d] not made significant progress on any portion of his case plan"; and that respondent-father "ha[d] not demonstrated that he ha[d] the ability or willingness to establish a safe home for [Sarah]."

As further support for the determinations contained in Finding of Fact Nos. 66 and 69, the trial court found as a fact that:

> 63. There is no evidence before the [c]ourt that [respondent-father] has maintained long-term sobriety.
>
> . . . .
>
> 67. [Respondent-father] has not maintained stable housing or employment. Since his discharge from the Cornerstone [Treatment Program] halfway house, it is unknown where he is currently residing. He has never provided verification of employment or income over the life of the case. He

> has not completed a parenting education program. He has not maintained consistent contact with [Sarah] through visits. He has significant medical and mental health issues but did not cooperate with YFS and the FIRST Program to assess and treat those conditions, and he has not provided any evidence to the [c]ourt of how he is appropriately managing those conditions.
>
> 68. The only case plan progress [that respondent-father] has made has occurred within the past 30–60 days, and occurred pursuant to his recent court-ordered supervised probation. Until entering the Cornerstone [Treatment P]rogram in September 2018, [respondent-father] remained adamant that he did not need or intend to engage with the FIRST Program which would have assessed his need for substance abuse treatment services, along with mental health and parenting education services.

In response, respondent-father asserts that these findings are in error to the extent that they indicate he had made no progress toward satisfying the requirements of his case plan and fail to account for the record evidence tending to show that he had recently made progress toward satisfying the requirements of his case plan in advance of the termination hearing.

Admittedly, the trial court did state in Finding of Fact No. 44 that, as of the 20 February 2018 review hearing, respondent-father "had made no progress towards reunification." To the extent that Finding of Fact No. 44 fails to reflect the undisputed evidence concerning respondent-father's visit with Sarah shortly after the 20 December 2017 review hearing or the irregular contact that respondent-father had with YFS representatives following his release from prison, it does overstate the degree of respondent-father's noncompliance with the provisions of his case plan. For that reason, we will refrain from taking that portion of the trial court's termination order into consideration in determining whether it should be affirmed or reversed on appeal. *See In re T.N.H.*, 372 N.C. at 411, 831 S.E.2d at 61 (noting that, even if a finding lacks sufficient evidentiary support, the remaining findings more than sufficed to support the challenged termination order).

A careful review of the remaining findings reveals that they either detail respondent-father's progress in addressing specific components of his case plan during the relevant review periods or indicate that respondent-father had not made "adequate progress" toward completing

the requirements of his case plan or "significant progress" toward reunification. The review orders entered throughout the pendency of the underlying neglect and dependency proceeding and the social workers' testimony concerning respondent-father's actions during the relevant review periods amply support the trial court's determination that respondent-father had not made adequate progress toward satisfying the requirements of his case plan or significant progress toward reunification prior to the 12 September 2018 review hearing.

In addition, the trial court made Finding of Fact Nos. 58 through 62 for the purpose of addressing the extent to which respondent-father had made progress toward satisfying the requirements of his case plan after the 12 September 2018 review hearing. In Finding of Fact Nos. 58 through 61, the trial court found that respondent-father's case plan had been updated over the telephone on 29 November 2018 after the cancellation of a scheduled 8 November 2018 meeting between YFS representatives and respondent-father; respondent-father's visitation with Sarah had been reinstated after respondent-father provided proof of negative drug screens from September and October 2018 to YFS; respondent-father had visited with Sarah on 1 December 2018; and respondent-father had completed a thirty-hour substance abuse program through the Restorative Justice Center in October 2018. In Finding of Fact Nos. 61 and 62, the trial court found that, while respondent-father had participated in the Cornerstone Treatment Program, he had failed to present evidence concerning the extent of his treatment needs, the nature of his treatment goals, and the content of the services that Cornerstone had recommended for him. In addition, the trial court found that respondent-father had not been engaged in any substance abuse treatment following his discharge from the Cornerstone Treatment Program on 9 December 2018 after he failed to return to the facility by the designated time. A careful examination of the record reveals that each of these findings are supported by the social worker's testimony during the termination hearing.

Respondent-father's challenge to the adequacy of the trial court's findings concerning his progress between the 12 September 2018 review hearing and the 12 December 2018 termination hearing rests primarily upon respondent-father's contentions concerning findings that the trial court did not make. According to respondent-father, the trial court's findings fail to take into account his testimony about his recent employment, his treatment for medical problems, his completion of the Cornerstone Treatment Program, the extent of his substance abuse treatment, his negative drug screens in November and December 2018, the money order that he had sent to the maternal great-aunt, the money order that

he planned to send to the great-aunt and the gifts that he planned to send to Sarah in December 2018, and his application for housing at Oxford House. The record clearly reflects, however, that the trial court adequately considered respondent-father's testimony. In fact, during the termination hearing, the trial court requested that respondent-father's trial counsel refrain from asking repetitive questions on the grounds that they had been "asked and answered" and that it had heard respondent-father's earlier testimony. In addition, the record clearly reflects that the trial court simply failed to credit the portions of respondent-father's testimony upon which this argument relies, given the absence of any verification for respondent-father's assertions. Aside from the fact that the social workers who testified at the termination hearing repeatedly stated that respondent-father had not provided proof in support of his claims to have recently made progress toward eliminating the barriers to his reunification with Sarah, respondent-father acknowledged that he had failed to provide supporting documentation for these claims and defended his failure to provide such documentation on the grounds that he did not know that he needed to provide such evidence and was not "about to provide something that [he] wasn't asked for." As further evidence of the trial court's unwillingness to find respondent-father's unsupported testimony credible in the absence of supporting documentation, Finding of Fact No. 62 states that, despite his testimony that he had tested negative for the presence of drugs in November and December 2018, respondent-father had "failed to provide any evidence of [the] negative drug screens."[9] Similarly, in Finding of Fact No. 67, the trial court noted that "[respondent-father had] never provided verification of employment or income over the life of the case." Thus, the record clearly establishes that the trial court simply did not find respondent-father's testimony concerning his recent efforts to comply with the requirements of his case plan to be credible, which is a determination that it is entitled to make without fear of appellate reversal in light of the applicable standard of review. *See In re T.N.H.*, 372 N.C. at 411, 831 S.E.2d at 61; *see also In re D.L.W.*, 368 N.C. at 844, 788 S.E.2d at 168. As a result, we conclude that there is ample evidentiary support for the trial court's findings that respondent-father had failed to make adequate

9. Although defendant claims to have attempted to introduce evidence concerning the allegedly negative November and December drug screens and asserts that his efforts to do so were unsuccessful because the trial court sustained an objection to the admission of the evidence in question, the portion of the transcript to which respondent-father directs our attention in support of this contention shows, instead, that the trial court sustained a YFS objection to the admission of evidence concerning the drug screens for September and October 2018, which the trial court found to have been negative in Finding of Fact No. 58.

progress toward achieving long-term sobriety, stable housing, and employment; had not maintained consistent contact with Sarah; had not completed a FIRST assessment or a parenting education program; and had only made progress toward satisfying some of the requirements of his case plan in order to avoid violating the terms and conditions of his probation and that the trial court did not err by stating in Finding of Fact Nos. 66 and 69 that respondent-father "ha[d] not made significant progress on any portion of his case plan" and "ha[d] not demonstrated that he ha[d] the ability or willingness to establish a safe home for [Sarah]."

Having determined that the trial court's findings of fact have adequate evidentiary support, we next consider whether the trial court's findings support its determination that respondent-father's parental rights in Sarah were subject to termination on the grounds of neglect. *See* N.C.G.S. § 7B-1111(a)(1); *see also In re N.D.A.*, 373 N.C. at 79–80, 833 S.E.2d at 775. We addressed a similar set of circumstances in *In re M.A.W.*, in which a child had been adjudicated to be a neglected juvenile based upon the mother's substance abuse and mental health problems while the father was incarcerated and in which "the trial court made an independent determination that neglect sufficient to justify termination of [the father's] parental rights existed at the time of the termination hearing and that a likelihood of repetition of neglect also existed." 370 N.C. at 153–54, 804 S.E.2d at 517 (citation omitted). In reversing a decision of the Court of Appeals overturning the trial court's termination order, *see In re M.A.W.*, 248 N.C. App. 52, 787 S.E.2d 461 (2016), *rev'd*, 370 N.C. 149, 804 S.E.2d 513 (2017), this Court held that the "trial court . . . appropriately considered the prior adjudication of neglect as relevant evidence during the termination hearing" and that the trial court's findings supported its determination that there was a likelihood that the neglect to which the juvenile had been subjected would be repeated if the child was to be placed in his care, given that the father "had a long history of criminal activity and substance abuse" and that, even though the father had "initially indicated his desire to be involved in [the juvenile's] life," he had, "after his release, failed to follow through consistently with the court's directives and recommendations." *In re M.A.W.*, 370 N.C. at 153, 154, 804 S.E.2d at 517. We reached this result on the grounds that, "[a]lthough [the father] completed a parenting course, attended Alcoholics Anonymous meetings, and completed his General Educational Development (GED) program while incarcerated, the trial court made numerous relevant findings of fact supporting termination that illuminated respondent's behavior following his release and which established a likelihood of repetition of neglect," *id.* at 154, 804 S.E.2d at 517, including findings that the father had not

complied with the recommendations made during his substance abuse assessment; that the regularity of the father's visits with the juvenile had diminished over time; that the father had not provided proof that he had completed the parenting course that he had taken while incarcerated; that the father denied social workers access to the residence of his mother, in which he allegedly lived; that the father's testimony that he was self-employed lacked credibility; that the father did not comply with clinical assessments; and that the father had not provided any care, discipline, or supervision to the juvenile since his release from incarceration approximately nine months earlier. *Id.* at 155, 804 S.E.2d at 518.

The trial court's findings of fact in this case are similar to those deemed sufficient to support the trial court's termination decision in *In re M.A.W.* In addition to finding that Sarah had been adjudicated to be a neglected and dependent juvenile on 15 February 2017, the trial court found that respondent-father had a history of criminal activity and substance abuse; that respondent-father had continued to engage in criminal activity during the pendency of the underlying neglect and dependency proceeding that resulted in his reincarceration and created additional limitations upon his ability to be available to Sarah; that respondent-father had not established a relationship with Sarah prior to the time that she was removed from the mother's care and had only visited with Sarah twice following his initial release from incarceration; that respondent-father had not developed a relationship with or demonstrated the ability to care for Sarah since his release from incarceration; and that respondent-father had not made significant progress toward correcting the barriers to reunification that were identified by the trial court, including addressing issues relating to employment, housing, substance abuse, mental health, and parenting skills. Thus, as was the case in *In re M.A.W.*, we hold that "[t]he trial court properly found that past neglect was established by [YFS] and that there was a likelihood of repetition of neglect[,]" 370 N.C. at 156, 804 S.E.2d at 518, given that the trial court's findings provide ample justification for its conclusion that respondent-father was unable to properly care for Sarah at the time of the termination hearing, *see In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232 (explaining that the trial court must consider evidence of changed circumstances in addition to evidence of the prior adjudication of neglect, with the determinative factors being the best interests of the child and the parent's fitness to care for the child at the time of the termination hearing).

In light of this determination, we hold that the trial court did not err by concluding that respondent-father's parental rights in Sarah were

subject to termination on the grounds of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). Moreover, given that "a finding by the trial court that any one of the grounds for termination enumerated in N.C.G.S. § 7B-1111(a) exists is sufficient to support a termination order[,]" *In re B.O.A.*, 372 N.C. 372, 380, 831 S.E.2d 305, 311 (2019) (citations omitted), we need not address respondent-father's challenge to the trial court's determination that his parental rights in Sarah were subject to termination based upon his willful failure to make reasonable progress toward correcting the conditions that led to Sarah's removal from the family home pursuant to N.C.G.S. § 7B-1111(a)(2). As a result, in light of the fact that respondent-father has not advanced any challenge to the trial court's dispositional decision in his brief before this Court, the trial court's termination order is affirmed.

AFFIRMED.

IN THE MATTER OF Z.A.M. AND E.B.M.

No. 212A19

Filed 3 April 2020

1. Termination of Parental Rights—grounds for termination—neglect—failure to make reasonable progress—sufficiency of findings

In a termination of parental rights case, the findings supported the conclusion that grounds existed to terminate for neglect and failure to make reasonable progress. The trial court found that defendant continued to use alcohol, and the father's three-month period of sobriety did not occur after the permanency planning hearing. Further, the trial court correctly determined that the father's three-month period of sobriety was outweighed by his continuous pattern of relapse.

2. Termination of Parental Rights—best interests of the child—abuse of discretion standard

The standard for reviewing the best interests of the child determination in a termination of parental rights proceeding is abuse of discretion. The trial court, which is involved in the case from the beginning and hears the evidence, is in the best position to assess and weigh the evidence, find the facts, and reach conclusions.

3. Termination of Parental Rights—best interests of the child—bond with parents—no abuse of discretion

The trial court did not err in a termination of parental rights proceeding by determining that the best interests of the children were served by termination despite the children's bond with the parents. The trial court considered the statutory factors and performed a reasoned analysis. The trial court's determination was not unsupported by reason or so arbitrary that it could not be the result of a reasoned decision.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered 6 March 2019 by Judge Wesley W. Barkley in District Court, Caldwell County. This matter was calendared in the Supreme Court on 25 March 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Staff Attorney Lucy R. McCarl for petitioner-appellee Caldwell County Department of Social Services.

Womble Bond Dickinson (US) LLP, by Lawrence Matthews and Erin Epley, for appellee Guardian ad Litem.

Rebekah W. Davis for respondent-appellant father.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant mother.

NEWBY, Justice.

Respondent-father and respondent-mother appeal from an order entered by the trial court terminating their parental rights to their children, Z.A.M. (Zane) and E.B.M. (Ethan)[1]. Upon careful consideration of respondents' arguments, we affirm the trial court order terminating respondents' parental rights.

Caldwell County Department of Social Services (DSS) has a history of involvement with these respondent-parents. The juveniles, Ethan and Zane, have been the subject of eight Child Protective Services (CPS) reports, four of which resulted in determinations that services were

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

appropriate due to parental abuse and domestic violence between respondents. The children's half-siblings also have an extensive history with CPS and have been raised by relatives. Respondents have a long history of substance abuse; criminal charges related to respondent-father's alcohol abuse date back to 1987, and criminal charges related to respondent-mother's substance abuse date back to 2007.

In February 2017, DSS became involved with the juveniles again due to respondent-parents' alcohol and substance abuse, and due to repeated domestic violence between respondent-parents. Once DSS became involved, respondent-mother took the juveniles to live with their maternal grandparents, with whom the juveniles had previously lived for over a year. While the juveniles resided with their grandparents, respondent-father admitted that he consumed alcohol, and respondent-mother admitted that she regularly used crack cocaine and opiates and engaged in criminal activity to support her drug habit. Though respondent-father called in weekly to check on the children, he was typically inebriated during the calls. Neither parent attempted to visit the children or offered any financial support.

After several incidents of domestic violence between respondents, on 11 July 2017, DSS filed juvenile petitions alleging Zane and Ethan were neglected and dependent. After a hearing, on 6 September 2017, the trial court entered adjudication and disposition orders concluding that the children were neglected and dependent. It awarded DSS custody of the children, and DSS determined that the juveniles should continue to reside with their maternal grandparents.

The trial court issued a case plan requiring respondents to, *inter alia*, complete clinical assessments with substance abuse components and comply with recommendations; execute consents for release of information to allow DSS to follow up with service providers; submit to random drug and alcohol screens; complete domestic violence assessments, comply with recommendations, and refrain from acts of violence; refrain from illegal drug and alcohol use; comply with the visitation plan; maintain appropriate housing and employment; and cooperate with the children's therapists. Respondents were allowed one hour of supervised visitation per week.

Respondents' efforts to address their substance and alcohol abuse varied. Respondent-mother completed sporadic detox programs but did not complete the rest of her required substance abuse treatment. Respondent-mother relapsed numerous times, missing and failing multiple drug tests. At one point, respondent-mother did find employment,

but she admitted to using her paycheck from the job to buy drugs. To further support her drug habit during relapses, respondent-mother committed various criminal acts resulting in multiple convictions and periods of criminal confinement while the children were out of the home. Furthermore, respondent-mother had not completed her required domestic violence treatment classes. She continued her relationship with respondent-father, resulting in more instances of domestic violence. Specifically, in March 2018, respondent-mother reported that respondent-father was intoxicated and had become violent, and she locked herself in the bathroom until law enforcement responded and removed her from the home. Based on this and respondents' continuous substance abuse, in March 2018, the trial court ordered that respondent-parents could no longer visit the minor children until respondent-parents could each pass two consecutive negative drug screens.

While respondent-father had begun Substance Abuse Intensive Outpatient Treatment (SAIOP) at the end of 2017, during this treatment, on 27 April 2018, respondent-father admitted to relapsing. In June 2018, respondent-father passed two consecutive alcohol screening tests and was able to resume visitation privileges. Visitation continued until 24 August 2018, however, when respondent-father failed a breathalyzer test. Despite respondent-father's alcohol use, he completed SAIOP treatment at the end of August 2018, after having failed his breathalyzer test days earlier. He then failed another alcohol screen on 21 September 2018. Additionally, respondent-father refused to attend any form of inpatient treatment from the time the children were removed from the home until after he knew that DSS would be pursuing termination of parental rights. Beginning 16 December 2018, he attended an approximately three-week inpatient program, two months before the termination hearing.

Prior to the 17 October 2018 review hearing, the trial court had established the primary permanent plan for the children as reunification and the secondary plan as adoption. Following the October hearing, on 1 November 2018, the trial court issued an order finding that the issues that led to DSS involvement continued to exist and that further efforts for reunification of the children with respondents would be unsuccessful and inconsistent with the best interests, welfare, health, and safety of the children. Accordingly, the trial court ceased reunification efforts and changed the primary permanent plan for the children to adoption and the secondary plan to guardianship.

On 21 December 2018, DSS filed a motion to terminate respondents' parental rights on grounds of neglect and willfully leaving the children in foster care for more than twelve months without making reasonable

progress to correct the conditions that led to their removal. *See* N.C.G.S. § 7B-1111(a)(1), (2) (2019).

On 20 February 2019, the trial court held a hearing on DSS's petition to terminate respondents' parental rights. After hearing and considering all of the evidence, the trial court made the following findings relevant to its adjudication of grounds to terminate respondents' parental rights under N.C.G.S. § 7B-1111(a)(1) and (2):

> 14. [On] September 6, 2017, the juveniles were adjudicated to be neglected and dependent juveniles pursuant to N.C.G.S. § 7B-101(5) and N.C.G.S. § 7B-101(9). Respondent parents each appeared at the hearing and stipulated to the allegations set forth in the juvenile petitions as modified in the written stipulation submitted to the court.
>
> 15. The juveniles are neglected juveniles within the meaning of 7B-101(15) and such neglect by Respondent father continues as of today's hearing. Respondent father has failed to adequately address his issues of alcohol abuse which contributed to domestic violence in the home. Respondent father's issues with alcohol and domestic violence caused the need for a Comprehensive Clinical Assessment (CCA) and treatment. Respondent father has received extensive treatment for his abuse of alcohol, including the completion of 90 hours of Substance Abuse Intensive Outpatient (SAIOP) treatment. Despite receiving such intensive treatment, Respondent father continues to use alcohol. He has experienced one period of sobriety in excess of three (3) months during the twenty-two (22) months the juveniles have been placed out of the home of the Respondent parents. Respondent father has willfully failed to successfully address his issues of alcohol abuse. These issues will continue to exist in the foreseeable future such that the juveniles will be unable to safely return to the home of the Respondent father.
>
> 16. The Respondent father has willfully left the juveniles in foster care for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances have [sic] been made in correcting the conditions which led to the juveniles to be placed out of the home. Respondent father submitted to a breathalyzer screen conducted by law enforcement personnel on

August 24, 2018, and registered a blood alcohol level of 0.18. Respondent father failed another breathalyzer screen on September 21, 2018, with a blood alcohol level of 0.13. Respondent father also has a history of evading alcohol screens, refusing to submit to alcohol screens as ordered by the court, and admitting to use of alcohol. Respondent father's behavior constitutes a willful failure to successfully address his abuse of alcohol.

17. The juveniles are neglected juveniles within the meaning of 7B-101(15) and such neglect by Respondent mother continues as of today's hearing. Respondent mother has made sincere efforts to address her issues of substance abuse, including the use of cocaine, methamphetamines, and opiates. However, her continued use of illegal substances involves multiple relapses which led to criminal confinement and instances of domestic violence with Respondent father. Respondent mother completed a CCA and attended some treatment. She has not sought treatment for domestic violence. She has attended inpatient treatment while the juveniles have been out of the home and is presently seeking her third inpatient treatment due to her continued use of illegal substances. She remains in a relationship with respondent father.

18. Respondent mother has willfully left the juveniles in foster care for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juveniles. Specifically, Respondent mother continues to willfully abuse substances despite participating in various treatment activities. She has relapsed several times over the past 12 months. She has engaged in criminal activities while under the influence of drugs and alcohol. Respondent mother has also failed to adequately address the issue of domestic violence. She did not complete domestic violence treatment classes and remains in a relationship with Respondent father. There is a reasonable probability that Respondent mother's issues of substance abuse will continue to exist in the foreseeable future such that the juveniles will be unable to safely return to the home of Respondent mother.

Based on these findings, the trial court concluded:

> 4. The juveniles are neglected juveniles as defined by N.C.G.S. § 7B-101(15) and such neglect continues as [of] the date of the hearing herein. There is a strong possibility that such neglect will be repeated in the future.
>
> 5. The juveniles have been willfully left in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the Court that outside of consideration of poverty, reasonable progress under the circumstances has been made correcting the conditions which led to the removal of the juvenile[s].
>
> 6. Grounds exist as hereinabove stated within the Findings of Fact to terminate the parental rights of . . . Respondent mother . . . and Respondent father . . . pursuant to N.C.G.S. § 7B-1111(a)(1) and (2).

Thus, the trial court also concluded it was in the best interests of the children to terminate respondents' parental rights, allowing the juveniles' maternal grandparents to pursue adoption. Respondents appeal.

On appeal respondent-father challenges the adjudication of grounds to terminate his parental rights and the trial court's best interests determination. Respondent-mother only challenges the trial court's best interests determination.

Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage. *See* N.C.G.S. §§ 7B-1109, -1110 (2019). The petitioner bears the burden at the adjudicatory stage of proving by "clear, cogent, and convincing evidence" that one or more grounds for termination exist under section 7B-1111(a) of the North Carolina General Statutes. N.C.G.S. § 7B-1109(f) (2019). If the trial court adjudicates one or more grounds for termination, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110)). "We review a trial court's adjudication under N.C.G.S. § 7B-1109 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316

S.E.2d 246, 253 (1984)). "The trial court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion." *In re Z.L.W.*, 372 N.C. 432, 435, 831 S.E.2d 62, 64 (2019) (citing *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016)).

[1] We now turn to respondent-father's arguments. First, regarding grounds for termination, respondent-father argues the trial court's findings of fact are insufficient to support its conclusion that grounds exist to terminate his parental rights under N.C.G.S. § 7B-1111(a)(1) and (2).

The trial court may terminate a parent's parental rights if at least one of the statutory grounds enumerated in N.C.G.S. § 7B-1111(a) exists. Specifically, under N.C.G.S. § 7B-1111(a)(1) (2019), parental rights may be terminated if the trial court finds the parent has neglected his or her child such that the child is a "neglected juvenile" within the meaning of section 7B-101 of the North Carolina General Statutes. N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare . . . ." N.C.G.S. § 7B-101(15) (2019). When it cannot be shown that the parent is neglecting his or her child at the time of the termination hearing because "the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). When determining whether future neglect is likely, the trial court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing. *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

Under N.C.G.S. § 7B-1111(a)(2) (2019), the trial court may terminate parental rights if a parent "has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2) (2017). Termination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. *See In re O.C.*, 171

N.C. App. 457, 464–65, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

Respondent-father largely asserts the same reasoning as to why the trial court erred in terminating his parental rights on both grounds. As for N.C.G.S. § 7B-1111(a)(1) (the neglect ground), respondent father asserts that the evidence does not support a finding that there is a strong possibility of future neglect. He also contends that the trial court failed to analyze evidence of changed conditions; respondent-father asserts that the trial court did not base its decision on any evidence after the October 2018 permanency planning hearing. Respondent-father cites the trial court's finding that he had one three-month period of sobriety during the twenty-two months that the juveniles were outside the home. Because the trial court did not provide dates for that three-month period, respondent-father asserts that the three months could have occurred after the October 2018 permanency planning hearing and before the termination hearing, showing changed circumstances that would weigh against terminating his parental rights. Thus, because respondent-father contends the trial court did not consider more recent circumstances leading up to the termination hearing, respondent-father argues that terminating his rights under the neglect ground was improper.

As for N.C.G.S. § 7B-1111(a)(2) (willfully leaving the child outside the home and failure to make reasonable progress), respondent-father asserts that his actions do not demonstrate a willful intent to leave the children outside the home. Respondent-father disagrees with the trial court's conclusion that he had not made reasonable progress to correct the conditions that led to the juveniles' removal. Because he need not make perfect progress in his case plan, respondent-father essentially argues that his progress was good enough to avoid having his parental rights terminated.

At the outset, however, we address respondent-father's argument that parts of the above findings are not actually findings of fact but are instead conclusions of law. Respondent-father specifically argues those portions of findings of fact 15 and 16 that find "[t]he juveniles are neglected juveniles within the meaning of 7B-101(15) and such neglect . . . continues as of today's hearing[,]" his "issues will continue to exist in the foreseeable future such that the juveniles will be unable to safely return to [his] home[,]" and "[he] has willfully left the juveniles in foster care for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstance [has] been made in correcting the conditions which led to the juveniles to be placed out of the home[,]" are conclusions of law rather than factual findings

given that they involve the exercise of judgment. This Court recently addressed a similar argument in *In re N.D.A.*, 373 N.C. 71, 76–77, 833 S.E.2d 768, 772–73 (N.C. 2019). In that case, this Court distinguished between factual findings, ultimate findings of fact, and conclusions of law:

> As the Supreme Court of the United States has stated, an "ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact" and should "be distinguished from the findings of primary, evidentiary, or circumstantial facts." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S. Ct. 569, 574, 81 L. Ed. 755, 762 (1937); *see also In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (stating that "[u]ltimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts" (citation omitted)). Regardless of whether statements like those contained in [the contested findings here] are classified as findings of ultimate facts or conclusions of law, that classification decision does not alter the fact that the trial court's determination concerning the extent to which a parent's parental rights in a child are subject to termination on the basis of a particular ground must have sufficient support in the trial court's factual findings. *See In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861 (2016) (stating that "a trial court must make adequate evidentiary findings to support its ultimate finding of willful intent" (citation omitted)).

Id. Accordingly, this Court reviews the termination order to determine whether the trial court made sufficient factual findings to support its ultimate findings of fact and conclusions of law, regardless of how they are classified in the order.

Upon review we reject respondent-father's arguments and conclude that clear, cogent, and convincing evidence supports the findings of fact underlying the trial court's decision to terminate his parental rights. Looking first at the neglect ground, it is evident that, contrary to respondent's argument, the trial court considered evidence after the October 2018 permanency planning hearing. Specifically, the trial court found that respondent-father continues to use alcohol, which is supported by respondent-father being admitted to an alcohol rehabilitation program on 16 December 2018, after the October 2018 permanency planning hearing. This fact also undermines respondent-father's argument that

his three-month period of sobriety may have occurred after the October 2018 permanency planning hearing and that the trial court did not consider any evidence leading up to the termination hearing. Notably, respondent-father was not released from the program until 7 January 2019, just over one month before the termination hearing. Based on the record evidence, the only three-month period of respondent-father's sobriety would have occurred between June 2018, after he passed two sobriety tests to regain visitation privileges he had lost, and August 2018, when respondent-father failed a breathalyzer despite completing his required SAIOP hours just a few days later.

Moreover, the trial court's findings clearly show that it evaluated respondent-father's history of alcohol abuse and his behavior over the entire twenty-two-month period during which the juveniles were outside the house, which showed a repeated pattern of returning to alcohol. Respondent-father failed and evaded numerous breathalyzer tests, admitted to relapsing several times during his outpatient treatment, and, notably, failed breathalyzer tests right before and after completing 90 hours of SAIOP. Given that respondent-father only maintained three months of sobriety in the twenty-two months during which the juveniles were living outside of the house, and given that there is evidence of respondent-father's alcohol abuse preceding the termination, it appears the trial court appropriately weighed all the evidence to conclude that there was a probability of repetition of neglect. *See Ballard*, 311 N.C. at 715–16, 319 S.E.2d at 232.

Because we conclude that the trial court properly terminated respondent-father's rights based on neglect, we need not determine whether termination is proper under N.C.G.S. § 7B-1111(a)(2) based on respondent-father willfully leaving the children outside the home and his failure to make reasonable progress. *See* N.C.G.S. § 7B-1111(a) (providing that the trial court may terminate a parent's rights if any ground for termination exists). Nonetheless, we note that N.C.G.S. § 7B-1111(a)(2) also supports the trial court's termination of respondent-father's parental rights based on the same reasoning that supported a termination based on neglect. When viewing the evidence as a whole, it appears that the trial court correctly concluded that respondent-father's three-month period of sobriety was outweighed by his continuous pattern of relapse, which occurred during the months he attended SAIOP.[2] As such, the trial

2. Respondent-father argues in part that although domestic violence was another reason why the children were removed from the home, respondent-father could not complete domestic violence counseling until after he had completed substance abuse treatment. Therefore, respondent-father argues that his failure to make progress in this area

court properly terminated respondent-father's rights on both statutorily alleged grounds.

[2] We now turn to the trial court's best interests determination. Respondents both contend that the trial court erred in determining that termination was in the juveniles' best interests. At the dispositional stage the trial court must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following criteria:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019). The trial court shall consider all of the factors and make written findings regarding those that are relevant. *Id.*

In her brief to this Court, respondent-mother does not contest any of the trial court's findings of fact; thus, they are binding on her appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). Respondent-mother recognizes the well-established abuse of discretion standard of review for evaluating a trial court's determination of a juvenile's best interests. Nonetheless, respondent-mother asserts that appellate courts should utilize a de novo standard of review on appeal and that under such review, it would be clear that terminating her parental rights is not in the children's best interests.

Having considered respondent-mother's arguments, we reaffirm our application of an abuse of discretion standard of review to the trial court's determination of "whether terminating the parent's rights is in the juvenile's best interest" under N.C.G.S. § 7B-1110(a). *See*, *e.g.*,

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should not be held against him. Even assuming this to be true, the trial court's decision to terminate respondent-father's rights is amply supported by evidence of respondent's continual failure to address his alcohol abuse.

Z.L.W., 372 N.C. at 435, 831 S.E.2d at 64; *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013). Under this standard, we defer to the trial court's decision unless it is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). Despite respondent-mother's arguments to the contrary, we reiterate that the trial court, which is involved in the case from the beginning and hears the evidence, is in the best position to assess and weigh the evidence, find the facts, and reach conclusions based thereon.

[3] As for the best interests determination itself, both respondents set forth similar arguments as to why they believe the trial court erred in concluding that termination would be in the children's best interests. Respondents both assert that the trial court did not give enough weight to the children's bond with them, nor did the court take into account the children's preferences. Respondents also assert that the trial court should have considered guardianship as an option so the parents could have the chance to regain custody of the children in the future. Finally, respondent-father argues that the court did not properly consider whether termination would aid in accomplishing a permanent placement for the children or any other relevant considerations.

Applying the proper standard of review here, we conclude that the trial court did not abuse its discretion when determining that terminating respondents' rights was in the juveniles' best interests. This Court recently addressed arguments similar to those that respondents assert in *In re Z.L.W.* In that case, this Court recognized that the trial court made findings concerning the strong bond between the juveniles and the respondent-parent, but explained that "the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 66. Based on the trial court's consideration of the other factors, and given the respondent's lack of progress in his case plan, this Court concluded that "the trial court's determination that other factors outweighed [the] respondent's strong bond with [the juveniles] was not manifestly unsupported by reason." *Id.* at 438, 832 S.E.2d at 66. Furthermore, this Court rejected the respondent's argument that the trial court should have considered dispositional alternatives, such as granting guardianship or custody to the foster family. This Court explained that,

> [w]hile the stated policy of the Juvenile Code is to prevent "the unnecessary or inappropriate separation of juveniles from their parents," N.C.G.S. § 7B-100(4) (2017), we note

> that "the best interests of the juvenile are of paramount consideration by the court and . . . when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a *safe, permanent home within a reasonable amount of time*," *id.* § 7B-100(5) (2017) (emphasis added); *see also In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 251 (emphasizing that "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star").

Id. Thus, in *Z.L.W.*, we held the trial court did not abuse its discretion in determining termination was in the best interests of the juveniles. *Id.*

Just as in *In re Z.L.W.*, the trial court's findings in this case show that it considered the dispositional factors in N.C.G.S. § 7B-1110(a) and performed a reasoned analysis weighing those factors. In doing so, the trial court recognized the children's bond with respondents, but weighed that bond against its findings that adoption was previously ordered as the primary permanent plan; that termination was necessary to achieve the primary permanent plan; that the children have been placed in their potential adoptive home with their maternal grandparents since April 2017; that the potential adoptive home is a loving and stable home where the children's needs are being met; that the children have a very good relationship with the maternal grandparents and are well bonded; and that it is very likely the children will be adopted. Based on its weighing of the factors, the trial court ultimately determined the best interests of the children would be served by terminating respondents' parental rights despite the children's bond with them. Because the trial court made sufficient dispositional findings and performed the proper analysis of the dispositional factors, we are satisfied the trial court's best interests determination was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

Because we conclude the trial court did not err in its decision, we affirm the trial court's termination of respondents' parental rights to Zane and Ethan.

AFFIRMED.

THE NEW HANOVER COUNTY BOARD OF EDUCATION
v.
JOSH STEIN, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; AND NORTH CAROLINA COASTAL FEDERATION AND SOUND RIVERS, INC., INTERVENORS

No. 339A18

Filed 3 April 2020

1. Jurisdiction—standing—hog farm agreement—Board of Education

The New Hanover Board of Education lacked standing to challenge the authority of the Attorney General to enter an agreement with Smithfield Foods concerning hog waste lagoons. The mere fact that the Attorney General and Smithfield Farms entered the agreement did not harm the Board of Education; the Board was not a party to and did not have rights under the agreement; and the Board would not be entitled to have any money paid to the school fund if the agreement was unenforceable.

2. Civil Procedure—summary judgment—hog farm agreement—intention of parties

There was no issue of fact sufficient to preclude summary judgment in an action that involved the issue of whether monies from a hog farm agreement between the Attorney General and Smithfield Foods were civil penalties that should have gone to the schools. Each of the alleged factual issues focused on questions such as the subjective intent of the parties at the time the agreement was executed and the purpose sought to be achieved. There were no credibility determinations and no additional evidence to shed light on the substantive legal issue in dispute.

3. Schools and Education—civil penalty fund—hog farm agreement

The trial court correctly decided to enter summary judgment for the Attorney General in a case questioning whether monies from an agreement with Smithfield Foods concerning hog waste should have gone into the civil penalties fund to be distributed to schools. The payments contemplated by the agreement did not stem from an enforcement action, were not intended to punish or deter Smithfield, and did not constitute penalties.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. 7A-30(2) from a divided panel of the Court of Appeals, 820 S.E.2d 89 (N.C. Ct. App. 2018), reversing and remanding an order entered on 12 October 2017 by Judge Paul C. Ridgeway in Superior Court, Wake County. On 30 January 2019, the Supreme Court allowed petitions for discretionary review as to additional issues filed by plaintiff, defendant, and intervenors. Heard in the Supreme Court on 19 November 2019 in session in the Whitted Building in the Town of Hillsborough pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Stam Law Firm, PLLC, by R. Daniel Gibson and Paul Stam, for plaintiff-appellee.

Joshua H. Stein, Attorney General, by Matthew W. Sawchak, Solicitor General, James W. Doggett, Deputy Solicitor General, and Marc Bernstein, Special Deputy Attorney General, for defendant-appellant Josh Stein.

The Southern Environmental Law Center, by Mary Maclean Asbill, Brooks Rainey Pearson, and Blakely E. Hildebrand, for intervenor-appellants North Carolina Coastal Federation and Sound Rivers, Inc.

Tharrington Smith, L.L.P., by Lindsay Vance Smith and Deborah R. Stagner; and Allison B. Schafer for North Carolina School Boards Association, amicus curiae.

ERVIN, Justice.

On 25 July 2000, following a five-year period during which ruptured or flooded hog waste lagoons spilled millions of gallons of waste into North Carolina's waterways, then-Attorney General Michael F. Easley entered into an agreement with Smithfield Foods, Inc., and several of its subsidiaries.[1] Pursuant to the agreement, Smithfield and its subsidiaries agreed to:

> (1) undertake immediate measures for enhanced environmental protection on Company-owned Farms and

1. The Smithfield subsidiaries that joined in the agreement include Brown's of Carolina, Inc.; Carroll's Foods, Inc.; Murphy Farms, Inc.; Carroll's Foods of Virginia, Inc.; and Quarter M Farms, Inc.

provide assistance to Contract Farmers in undertaking these same measures;

(2) commit $15 million for the development of Environmentally Superior Technologies for the management of swine waste and to facilitate the development, testing, and evaluation of potential technologies on Company-owned Farms;

(3) install Environmentally Superior Technologies on each Company-owned Farm in North Carolina and provide financial and technical assistance to Contract Farmers for the installation of these technologies;

(4) commit $ 50 million to environmental enhancement activities;

(5) cooperate fully with the Attorney General to ensure compliance with applicable laws, regulations, policies and standards; and

(6) in cooperation with the Attorney General and all other interested parties, take a leadership role in enhancing the effectiveness of the Albemarle-Pamlico National Estuary Program . . . .

In compliance with the provision of the agreement in which Smithfield and its subsidiaries agreed to commit $50 million to facilitate environmental enhancement activities, the entities in question promised to "pay each year for 25 years an amount equal to one dollar for each hog in which [Smithfield and its subsidiaries] . . . had any financial interest in North Carolina during the previous year, provided . . . that such amount shall not exceed $2 million in any year." The agreement further provided that the monies derived from these payments were to be deposited into an escrow account and "paid to such organizations or trusts as the Attorney General will designate . . . to enhance the environment of the State." In administering the grant program, the Attorney General was entitled to consult with the North Carolina Department of Environmental Quality[2] and "any other groups or individuals he deem[ed] appropriate and [to] appoint any advisory committees he deem[ed] appropriate." Finally, the agreement provided that, "in consideration of the commitments by

2. At the time that the agreement between the Attorney General and Smithfield and its subsidiaries was entered into, the North Carolina Department of Environmental Quality was known as the North Carolina Department of Environment and Natural Resources.

[Smithfield and its subsidiaries], the Attorney General agrees . . . [t]o use the full power and authority of his office to diligently pursue expeditious implementation of Environmentally Superior Technologies" on farms identified in the agreement; to "use his influence to expedite the permitting process"; and to refrain from "undertak[ing] any actions in conflict with" the agreement.

In January 2003, then-Attorney General Roy Cooper established the Environmental Enhancement Grants Program in order to "improve the air, water and land quality of North Carolina by funding environmental projects that address the goals of the agreement." On an annual basis, the grant program accepts applications from government agencies and nonprofit organizations. The submitted applications are reviewed by a panel consisting of representatives from the North Carolina Department of Justice, the Department of Environmental Quality, the North Carolina Department of Natural and Cultural Resources, academic institutions, and conservation-focused nonprofit organizations.

After completing the review process, the panel makes a recommendation to the Attorney General concerning the manner in which the available grant monies should be distributed. A representative of Smithfield and its subsidiaries is entitled to make a separate recommendation concerning the same subject. After considering the recommendation, the Attorney General selects the recipients to be awarded grants and determines the amount, up to a maximum of $500,000, to be awarded to each recipient. In the years since the agreement was executed, the Attorney General has awarded approximately $25 million in grants under the program.

On 18 October 2016, Francis X. De Luca filed a complaint alleging that payments made pursuant to the agreement were actually civil penalties for purposes of article IX, section 7 of the North Carolina Constitution, which states that:

> (a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.
>
> (b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures, and fines

> which are collected by State agencies and which belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7. As a result, Mr. De Luca sought to have the Attorney General preliminarily and permanently enjoined from distributing monies received pursuant to the agreement to any recipient other than the Civil Penalty and Forfeiture Fund authorized by article IX, section 7(b) and N.C.G.S. §§ 115C-457.1–475.3 and requested that all monies distributed under the grant program within the last three years and all future payments received by the Attorney General be placed into the Civil Penalty and Forfeiture Fund.

On 19 December 2016, the Attorney General filed a motion to dismiss Mr. De Luca's complaint pursuant to Rules 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 25 January 2017, Mr. De Luca filed an amended complaint adding the New Hanover County Board of Education as an additional party plaintiff and substituting current Attorney General Joshua H. Stein, in his official capacity, as the party defendant. The Attorney General then filed an amended dismissal motion. On 14 June 2017, plaintiffs filed a motion seeking the issuance of a preliminary injunction precluding the Attorney General from making any further disbursements under the grant program and requiring the Attorney General to initiate legal proceedings to recoup any funds that had been disbursed in accordance with the grant program since 2014. On 16 June 2017, plaintiffs filed a motion seeking the entry of summary judgment in their favor.

On 27 June 2017, Judge Robert H. Hobgood entered an order denying the Attorney General's amended dismissal motion and directing the Attorney General to answer the amended complaint and an additional order preliminarily enjoining the Attorney General from making disbursements under the agreement pending final resolution of this case. On 17 July 2017, the Attorney General filed an answer to plaintiffs' amended complaint in which he denied the material allegations contained in the amended complaint and asserted a number of affirmative defenses, including laches, waiver, failure of consideration, and equitable estoppel. On 21 July 2017, Judge Hobgood entered an amended preliminary injunction precluding the Attorney General from making any disbursements to recipients relating to grants awarded on or after 30 September 2016. On 21 August 2017, the North Carolina Coastal

Federation and Sound Rivers, Inc., filed a motion seeking leave to intervene in support of the Attorney General and a proposed answer to plaintiffs' amended complaint.

On 22 September 2017, the Attorney General filed a motion seeking the entry of summary judgment in his favor along with a number of attached affidavits from individuals with knowledge about the process that led to the execution of the agreement. In his affidavit, Alan S. Hirsch, a former Director of the Consumer Protection Division of the Department of Justice, stated that he had "led the negotiation and drafting" of the agreement on behalf of the Attorney General. Mr. Hirsch averred that, in his opinion, Smithfield and its subsidiaries had entered into the agreement in order to address a "long running problem of major public concern, to demonstrate good corporate citizenship[,] . . . and to further its public standing by making additional enhancements of North Carolina's environment" given that "[t]he image of the industry was under intense scrutiny." Mr. Hirsch indicated that the agreement was drafted in such a manner as to prevent it from being "read to limit or affect in any way the compliance responsibilities of [the Department of Environmental Quality]"; that the agreement did not "arise from," "address," or "settle" "any actual or alleged violations of law" that Smithfield and its subsidiaries might have committed in the past or might commit in the future or to resolve any cases in which a civil penalty "had been issued or might later be issued" against Smithfield and its subsidiaries; and that "[n]o penalties or punitive action of any sort was ever discussed or considered" during the negotiations of the agreement.

Daniel C. Oakley, a former Director of the Environmental Division of the Department of Justice, averred in his affidavit that he had been a "primary negotiator" of the agreement. According to Mr. Oakley, "the agreement was not reached in order to settle any cases in which a civil penalty had been assessed by [the Department of Environmental Quality]." In fact, Mr. Oakley "[knew] that no civil penalty being defended by attorneys in [his] [d]ivision was settled, compromised, or in any way impacted by the negotiation or execution of" the agreement. In addition, Mr. Oakley noted that, "[a]lthough there were Notices of Violation and Civil Penalty Assessments issued to various hog farms from 1995 to 2001, any Civil Penalty Assessments were resolved by other means and were not part of the [a]greement at issue in this case." Finally, Mr. Oakley stated that Roy Cooper took office as Attorney General and William G. Ross took office as Secretary of the Department of Environmental Quality in January 2001 and that these two individuals had "ensured that [the Department of Environmental Quality] continued its robust enforcement activity

against those of the State's hog farms that were not in compliance with laws and regulations for discharge and non-discharge operations."

Dennis Ramsey, a former Supervisor of the Non-Discharge Branch of the Division of Water Resources at the Department of Environmental Quality, stated in his affidavit that penalties for environmental noncompliance were assessed by the director of the Division of Water Quality from 1995 until 2001. Mr. Ramsey indicated that he had been responsible for making recommendations to the division director concerning the entities that should be penalized during that period. In addition, Mr. Ramsey averred that he was familiar with the process by which penalty assessments were settled and compromised. Mr. Ramsey stated that he had never been asked to modify any enforcement-related recommendation based upon the agreement and that, "[t]o the best of [his] knowledge," the agreement was "entirely separate from, and in no way related to, any pending or anticipated enforcement action by [the Department of Environmental Quality] against any of the signatories to the [a]greement."

Finally, Christine Lawson, the Program Manager for the Department of Environmental Quality's Animal Feeding Operations Program, executed an affidavit in which she provided information demonstrating that the Department of Environmental Quality had assessed approximately nineteen civil penalties against Smithfield and its subsidiaries during the year preceding the execution of the agreement and the year following the execution of the agreement. According to the information provided by Ms. Lawson, almost half of those penalties were assessed after the execution of the agreement and were based upon notices of violation that had been issued prior to the agreement's execution.

On 25 September 2017, the North Carolina School Boards Association filed a motion seeking leave to file an amicus curiae brief in support of plaintiffs' position. On 28 September 2017, plaintiffs filed a response in opposition to the intervention petition filed by the Coastal Federation and Sound Rivers and a renewed summary judgment motion in which they cited to (1) records showing a history of environmental violations by Smithfield and its subsidiaries, including several violations that had been noticed in the year prior to the execution of this agreement; (2) a letter written by counsel for Smithfield and its subsidiaries several months after the execution of the agreement stating that "Smithfield [and its subsidiaries] benefit[ ] [from the agreement] because it is an opportunity to avoid enforcement actions by correcting deficiencies before they become enforcement problems" and because it "gives both the State and Smithfield [and its subsidiaries] an opportunity to correct

deficiencies that might not be compliance problems now, but could lead to noncompliance in the future if not corrected"; and (3) statements that the Attorney General's Office had made in press releases issued in 2002 and 2013 referring to the agreement as a "settlement." In addition, plaintiffs asserted that the Attorney General lacked the authority to enter into the agreement.

On 12 October 2017, the trial court entered an ordering granting summary judgment in favor of the Attorney General. In reaching this conclusion, the trial court stated that the Attorney General had "presented sufficient evidence to establish its right to judgment as a matter of law that . . . the payments made by [Smithfield and its subsidiaries] under the [agreement] were not 'penalties,' 'forfeitures,' or 'fines' collected for 'any breach of the penal laws of the State' and thus [were] not within the scope of article IX, sec[tion] 7." According to the trial court, the facts in this case are distinguishable from those at issue in earlier penalty-related cases decided by this Court. The trial court determined that, even if Smithfield and its subsidiaries had entered into the agreement in the hope of avoiding future penalties, this "speculation[,] . . . even if true, would not be sufficient, as a matter of law, to recast the payments made under the [agreement] as 'penalties,' 'forfeitures' or 'fines' collected 'for any breach of the penal laws of the State' " for purposes of article IX, section 7. In other words, the trial court decided that "there is simply no proffer of competent evidence" that the agreement was entered into "to reduce, settle, remit or compromise any threatened or pending violation or to obtain forbearance by [the Department of Environmental Quality] of any anticipated enforcement action." Finally, the trial court noted that plaintiffs had not challenged the Attorney General's constitutional authority to enter into the agreement in the complaint and that, even if plaintiffs had pled such a claim, "it does not logically follow that the payments made under the [agreement], if made pursuant to an agreement in excess of the Attorney General's authority, would fall under the scope of article IX, sec[tion] 7." As a result, the trial court granted the Attorney General's motion for summary judgment, denied plaintiffs' summary judgment motion, dismissed plaintiffs' complaint, and dissolved the preliminary injunction. The trial court entered separate orders allowing the intervention petition filed by the Coastal Federation and Sound Rivers and the filing of the amicus curiae brief submitted by the School Boards Association. Plaintiffs noted an appeal from the trial court's orders to the Court of Appeals.

In seeking relief from the trial court's orders before the Court of Appeals, plaintiffs argued that the payments made pursuant to the

agreement constituted penalties for purposes of article IX, section 7 and that the Attorney General lacked the authority to enter into the agreement unless it was a settlement agreement subject to article IX, section 7. On 4 September 2018, the Court of Appeals filed an opinion reversing the trial court's summary judgment order and remanding this case to the Superior Court, Wake County, for trial.

The Court of Appeals began its analysis by addressing the issue of whether Mr. De Luca had standing to assert a claim against the Attorney General pursuant to article IX, section 7. *De Luca v. Stein*, 820 S.E.2d 89 (N.C. Ct. App. 2018). According to the Court of Appeals, Mr. De Luca had failed to allege that "(1) the payments at issue constitute an illegal or unconstitutional tax; (2) the [a]greement has caused him a personal, direct, and irreparable injury; or, (3) he is a member of a class prejudiced by the [a]greement," *id.* at 95 (citing *Texfi Indus., Inc. v. City of Fayetteville*, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980)), and had failed to file suit on behalf of any local board of education, make any demand upon an entity with standing to assert a claim such as the one at issue to in this case, or demonstrate that the making of such a demand would be futile. *Id.* On the other hand, the Court of Appeals held that the Board of Education did have standing to bring an action against the Attorney General pursuant to article IX, section 7 because it was an intended beneficiary of monies that were subject to the relevant constitutional provision and claimed to have been unconstitutionally deprived of monies to which it was entitled. *Id.*

Secondly, the Court of Appeals addressed plaintiffs' contention that payments made pursuant to the agreement constituted penalties for purposes of article IX, section 7. *Id.* at 96. In spite of the fact that "[t]he sworn attestations in the[ ] affidavits [submitted on behalf of the Attorney General] purport [that] the payments [Smithfield and its subsidiaries] undertook to pay under the [a]greement are not punitive because they did not resolve any past, present, or future violations of environmental laws," the Court of Appeals noted that "several factors in the record raise genuine issues of material fact regarding whether the payments were 'intended to penalize' [Smithfield and its subsidiaries] or were 'imposed to deter future violations and to extract retribution from' [Smithfield and its subsidiaries]." *Id.* at 97 (citing *Mussallam v. Mussallam*, 321 N.C. 504, 509, 364 S.E.2d 364, 367 (1988); *N.C. Sch. Bds. Ass'n v. Moore*, 358 N.C. 474, 496, 614 S.E.2d 504, 517 (2005)). More specifically, the Court of Appeals held that the record reflected the existence of genuine issues of material fact concerning whether

the agreement had been "instigated at the behest of and initiated by the Attorney General's office" rather than by Smithfield and its subsidiaries or the Department of Environmental Quality and why "the Attorney General retains sole authority over the disbursement of the funds" if the agreement was "sought or undertaken by [Smithfield and its subsidiaries] to 'demonstrate good corporate citizenship' and to 'improve the image' of the hog farming industry." *Id.* at 97–98. In addition, the Court of Appeals held that there was a genuine issue of material fact concerning whether "the basis, formula, and manner in which the amounts are calculated for [Smithfield and its subsidiaries] to pay each year under the [a]greement [rested more upon] penalties, or a 'head tax' calculation,' rather than [being] 'voluntary contributions' designed to enhance [Smithfield and its subsidiaries'] 'good corporate citizenship,' images or goodwill." *Id.* at 98. In other words, the Court of Appeals questioned why Smithfield and its subsidiaries "would agree to pay $1-per-hog over 25 years as opposed to a specific lump sum or stated contribution" if they were "purely motivated out of a desire to further their corporate image" given that "the per-hog payments specified under the agreement [bore] a resemblance to the per-cigarette payments [that] the General Assembly enacted in the late 1990s to implement the Master Settlement Agreement with tobacco manufacturers to settle lawsuits filed by several states' Attorneys General . . . over healthcare costs stemming from tobacco use." *Id.* Thus, the Court of Appeals held that "a genuine issue of material fact exist[ed concerning] whether the agreement was motivated by a desire by [Smithfield and its subsidiaries] to forestall, or forebear, any potential claims the Attorney General or [the Department of Environmental Quality] could have asserted against them" and "whether [Smithfield and its subsidiaries] would not have agreed to make the payments at issue, but for potential legal claims, and consequent civil penalties or fines, the Attorney General could have asserted against them." *Id.* at 99.

Similarly, the Court of Appeals held that the timing of enforcement actions taken against Smithfield and its subsidiaries raised a genuine issue of material fact as to whether the payments provided for in the agreement were intended to be punitive in nature. *Id.* In support of its decision, the Court of Appeals noted that, even though the Department of Environmental Quality had assessed nine penalties against Smithfield and its subsidiaries in the fourteen months preceding the signing of the agreement and an additional nine penalties in the eight months following the signing of the agreement, each of the penalties related to "notices of violations accrued or issued by [the Department of Environmental Quality] before the [a]greement was executed." *Id.* (emphasis omitted).

In addition, the Court of Appeals determined that the record "d[id] not demonstrate [that the Department of Environmental Quality had] issued any notices of violations to [Smithfield and its subsidiaries] after the [a]greement was signed." *Id.* (emphasis omitted). According to the Court of Appeals, the "apparent discrepancy between the number of notices of violations issued to [Smithfield and its subsidiaries] before and after the [a]greement was signed" raised a genuine issue of material fact concerning whether payments made pursuant to the agreement were made "in lieu of further enforcement actions[ ] and their related civil penalties." *Id.* (emphasis omitted).

Finally, the Court of Appeals held that "the express terms of the [a]greement" evidenced the existence of a genuine issue of material fact concerning whether the payments were intended to "penalize [Smithfield and its subsidiaries] for non-compliance with environmental standards or to induce forbearance on the part of the Attorney General, or [the Department of Environmental Quality], in bringing future enforcement actions." *Id.* at 99–100. In essence, the Court of Appeals asked "why [Smithfield and its subsidiaries] committed to undertake actions to remediate deficient conditions on their farms and operations, install equipment, and additionally pay up to $50 million" for environmental enhancement activities, particularly given that they had "relinquish[ed] any control over to whom and in what amounts the Attorney General distribute[d] the environmental grants." *Id.* at 100 (emphasis omitted). Similarly, the Court of Appeals noted that the Attorney General had described the agreement as a "settlement" in press releases issued in 2002 and 2013 and concluded that these descriptions of the agreement raised a genuine issue of material fact concerning the extent to which the payments provided for in the agreement were intended to be penalties. *Id.* As a result, given that the Court of Appeals determined that the record disclosed the existence of genuine issues of material fact and that "[t]he record . . . is not sufficiently developed for [the Court of Appeals] to make the de novo determination of whether the payments undertaken by [Smithfield and its subsidiaries] under the [a]greement were, as a matter of law, 'penalties' within the scope of [article IX, section 7]," the Court of Appeals reversed the trial court's order and remanded this case to the Superior Court, Wake County, "to determine whether the payments in the [a]greement were intended to constitute penalties, payment in lieu of penalties, forbearance for potential or future enforcement actions, or were not penalties." *Id.* (emphasis omitted).

In dissenting from the majority's decision, Judge Bryant stated that "the record on appeal is sufficient to make a determination as a matter

of law on the question before this Court" and opined that the trial court had not erred by concluding as a matter of law that funds paid pursuant to the agreement were not penalties subject to article IX, section 7. *Id.* at 101. According to Judge Bryant, the majority erroneously created an argument that had not been advanced by any party in the course of concluding that the record disclosed the existence of genuine issues of material fact necessitating a trial on the merits. *Id.* Instead, Judge Bryant "would [have] reach[ed] the main legal issue that is before us—which is the same issue that was before the trial court—[and would have held] that the trial court properly applied the law to the undisputed material facts of this case, and affirm the judgment of the trial court." *Id.*

The Attorney General and the Coastal Federation and Sound Rivers filed notices of appeal seeking review of the Court of Appeals' decision based upon Judge Bryant's dissent. In addition, each party filed a petition seeking discretionary review of additional issues pursuant to N.C.G.S. § 7A-31 to ensure that each of the issues that had been properly raised in this case before the lower courts were properly before this Court.[3] The Court allowed each party's discretionary review petition.

In seeking to persuade us to overturn the Court of Appeals' decision, the Attorney General[4] argues that, unlike this Court's earlier decisions holding that payments relating to the violation of environmental standards constituted civil penalties for purposes of article IX, section 7, this case did not involve the replacement of, or a reduction in, a previously assessed civil penalty resulting from violations of environmental standards. As a result, the Attorney General contends that the Court of Appeals erred by failing to hold that the payments made in compliance with the agreement fell outside the scope of article IX, section 7.

In addition, the Attorney General contends that the Court of Appeals failed to base its decision upon the analytical framework that appellate courts are required to utilize in evaluating the validity of a trial court's decision to grant or deny a summary judgment motion. The Attorney General argues that, after affidavits tending to show that payments made

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3. Although the Board of Education expressed disagreement with the Court of Appeals' determination that Mr. De Luca lacked standing to challenge the Attorney General's failure to pay monies received under the agreement to the Civil Penalty and Forfeiture Fund, Mr. De Luca refrained from seeking review of the Court of Appeals' standing-related decision because the Board of Education could adequately present plaintiffs' challenge to the agreement before this Court.

4. The brief filed by the Coastal Federation and Sound Rivers adopted the arguments advanced by the Attorney General.

pursuant to the agreement should not be treated as penalties had been submitted, the burden shifted to plaintiffs to rebut that evidence. *See* N.C.G.S. § 1A-1, Rule 56(c), (e); *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 50–51, 727 S.E.2d 866, 871–72 (2012) (affirming the trial court's decision to grant summary judgment in the plaintiff's favor in a case in which the plaintiff presented "minimally sufficient" evidence to satisfy its burden and the responsive evidence offered by the defendant "failed to demonstrate that an issue of material fact remained"); *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976) (holding that, where the party seeking summary judgment has produced sufficient evidence to demonstrate that he or she is entitled to prevail as a matter of law, "the rule requires the party opposing a motion for summary judgment—notwithstanding a general denial in his pleadings—to show that he [or she] has, or will have, evidence sufficient to raise an issue of fact"). The Attorney General contends, instead, that the Court of Appeals developed a number of unsupported and speculative theories for the purpose of showing that the record did, in fact, disclose the existence of disputed factual issues. As a result, the Attorney General contends that the Court of Appeals' conclusion that there are genuine issues of material fact should be reversed as well.

In seeking to persuade us to reverse the decision of the Court of Appeals, the Board of Education argues that there is no genuine issue of material fact in this case and that the only question that we should address and resolve is the extent to which a payment made pursuant to the agreement constitutes a settlement of penalty claims, so that the payments required by the agreement must be remitted to the Civil Penalty and Forfeiture Fund. The Board of Education argues that it "provided many examples of [Smithfield and its subsidiaries'] violations and assessed penalties, press releases, and other documents" that "prove[d that] the [a]greement is a settlement agreement and is subject to article IX, section 7." However, instead of resolving the substantive issue that both parties agree was before the Court of Appeals, the Board of Education contends that the Court of Appeals erred by holding that the parties' subjective intent in entering into the agreement "would be determinative" and by concluding that there existed a genuine issue of material fact as to the parties' subjective intent.

Next, the Board of Education asserts that the agreement is a settlement, with this contention being based upon record evidence that, in its opinion, demonstrates that (1) the payments made pursuant to the agreement were designed to deter noncompliance on the part of Smithfield and its subsidiaries and are, for that reason, the functional equivalent of

penalties; (2) the payments made pursuant to the agreement are punitive rather than remedial in nature; and (3) the Attorney General's references to the agreement as a settlement in 2002 and 2013 demonstrate that the Attorney General understood the agreement to be a settlement. As a result, the Board of Education contends that this Court should hold that the payments made pursuant to the agreement constitute penalties subject to article IX, section 7 and should, for that reason, be remitted to the Civil Penalty and Forfeiture Fund.

We review appeals from trial court summary judgment orders using a de novo standard of review. *Daughtridge v. Tanager Land, LLC*, 835 S.E.2d 411, 415 (N.C. 2019) (citing *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 334–35, 777 S.E.2d 272, 278 (2015)). "The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) (citing 2 McIntosh, *N.C. Practice and Procedure* § 1660.5 (2d Ed., Phillips' Supp. 1970); 3 Barron and Holtzoff, *Federal Practice and Procedure* § 1234 (Wright ed., 1958)). Summary judgment is appropriate in two instances: "(a) [t]hose where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial." *Id.*

"Summary judgment is proper if 'there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law.' " *Daughtridge*, 835 S.E.2d at 415 (citing N.C.G.S. § 1A-1, Rule 56(c) (2017)). "The movant is entitled to summary judgment . . . when only a question of law arises based on undisputed facts." *Id.* In determining whether the entry of summary judgment is or is not appropriate, the trial court must take "[a]ll facts asserted by the [nonmoving] party . . . as true" and view the evidence "in the light most favorable to that party." *Id.* (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). Summary judgment involves a two-step process: first, "[t]he party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact," *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citing *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997)), and then, "[o]nce the moving party satisfies these tests, the burden shifts to the nonmoving party to 'produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial.' " *Id.* at 681–82, 565 S.E.2d at 146 (quoting *Collingwood*

v. Gen. Elec. Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

[1] As an initial matter, we note that the Board of Education argued, among other things, that the payments contemplated in the agreement could only have been a penalty given that the Attorney General lacked the authority to enter into the agreement unless it involved the settlement of a notice of violation. In support of this assertion, the Board of Education argued that, at the time that the agreement was entered into, the only authority granted to the Attorney General was that delineated in N.C.G.S. §§ 114-1.1 and 114-2, neither of which give the Attorney General the power to enter into an agreement such as the one at issue in this case, and that the agreement must have been a settlement for that reason.[5] The Attorney General, on the other hand, argued that, as the State's chief legal officer, he possessed the common law authority to manage the legal affairs of the State, including the authority to accept gifts on behalf of the State such as the grant funding embodied in the agreement. Although the question of the extent to which the Attorney General had the authority to enter into the agreement is an interesting one, we do not believe that it is before us in this case.

Generally speaking, the only persons entitled to "call into question the validity of a statute [are those] who have been injuriously affected thereby in their persons, property or constitutional rights." *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962) (citing *Leonard v. Maxwell*, 216 N.C. 89, 98, 3 S.E.2d 316 (1939); and *St. George v. Hardie*, 147 N.C. 88, 98, 60 S.E. 920 (1908)); *see also Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 SE.2d 279, 282 (2008) (stating that "the 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions' " (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973))). In this instance, the mere fact that the Attorney General and Smithfield and its subsidiaries entered into the agreement did no harm to the Board of Education in light of the fact that it was not a party to the agreement, did not have any rights under the agreement, and would not be entitled to have any monies paid into the Civil Penalty and Forfeiture Fund in the event that the agreement was determined to be

5. As an aside, we note that the Board of Education never argued before this Court that the Attorney General lacked the authority to enter into the agreement at all and, in fact, expressly disclaimed any intention of doing so.

unenforceable. For that reason, while the Board of Education did have standing to assert that the payments made pursuant to the agreement constituted penalties for purposes of article IX, section 7, it lacks standing to assert that the Attorney General lacked the authority to enter into the agreement at all and appropriately made no such argument.

Moreover, the ultimate issue before us in this case is not whether the Attorney General had the authority to enter into the agreement. Instead, the question that we are called upon to decide in this instance is whether, taking the existence of the agreement as a given, payments made pursuant to the agreement constitute penalties that must be turned over to the Civil Penalty and Forfeiture Fund or something else. As a result, for all of these reasons, we express no opinion concerning the extent, if any, to which the Attorney General had the right to enter into the agreement or what status any relevant party would occupy in the event that the agreement was determined to be invalid.

[2] The first issue that we do have to address is whether, as the Court of Appeals determined, one or more genuine issues of material fact exist in this case or whether this case involves "only a question of law on the indisputable facts . . . in controversy [that] can be appropriately decided without full exposure of trial." *Kessing*, 278 N.C. at 533, 180 S.E.2d at 829. As we have already noted, all of the parties to this case are, and the trial court was, of the opinion that no such factual issue arose upon the present record. Although the Court of Appeals concluded that issues of fact that needed to be resolved at trial existed in this case, each of the allegedly factual issues delineated in the Court of Appeals' opinion focuses upon the subjective intentions with which either the Attorney General or Smithfield and its subsidiaries acted at the time that the agreement was executed, the purposes that Smithfield and its subsidiaries sought to achieve by entering into the agreement, and other similar questions. We do not believe that any of the "issues" upon which the Court of Appeals' decision was predicated suffice to preclude an award of summary judgment on behalf of one party or the other to this case.

We begin by noting that the Court of Appeals did not point to any conflicts in the evidence about which credibility determinations needed to be made. *See Kessing*, 278 N.C. at 535, 180 S.E.2d at 830. Moreover, none of the parties indicated that additional evidence existed that might shed light upon the substantive legal issue that is in dispute between the parties. On the other hand, a number of the issues that the Court of Appeals believed to require further factual development involve the manner in which the undisputed evidence should be evaluated in light of the applicable legal standard, rather than disputed issues of fact about

which further factual development would be appropriate. As this Court has previously stated, "the presence of important or difficult questions of law is no barrier to the granting of summary judgment," id. at 534, 180 S.E.2d at 830 (citing *Ammons v. Franklin Life Ins.*, 348 F. 2d 414 (5th Cir. 1965); *Palmer v. Chamberlin*, 191 F.2d 532, 27 A.L.R.2d 416 (5th Cir. 1951); *Crowder v. United States*, 255 F. Supp. 873 (N.D. Cal. 1964), aff'd, 362 F.2d 1011 (9th Cir. 1966); 3 Barron and Holtzoff, *supra* § 1234, pp. 126–27 (Wright ed. 1958); 6 *Moore's Federal Practice* § 56.16 (2d ed. 1966)), and the record suggests that the questions that we have before us in this case are just such issues of law rather than disputed issues of material fact.

Secondly, and perhaps more importantly, the bulk of the "factual" issues upon which the Court of Appeals relied in remanding this case for trial focus upon the subjective intent of the parties at the time that they took certain actions. However, as has already been noted, the principal substantive issue that we are called upon to decide in this case is whether the payments that are received pursuant to the agreement are or are not penalties as that term is used in article IX, section 7. In making that determination, our focus must necessarily be upon what the payments actually are, rather than upon questions such as which party instigated the process that led to the execution of the agreement, why the agreement was structured the way that it was, or what each party subjectively and in isolation thought to be the purpose served by the payments contemplated under the agreement. For that reason, most of the issues of "fact" upon which the Court of Appeals' decision rests are simply irrelevant to the ultimate legal issue that the Court has been called upon to resolve in this case and pose no obstacle to a decision to grant summary judgment in favor of one party or the other. As a result, we hold (1) that the Court of Appeals erred by reversing the trial court's order and remanding this case to the Superior Court, Wake County, for trial on the merits and (2) that this case is ripe for resolution on the merits on the basis of the parties' cross motions for summary judgment.

[3] As we have already noted, article IX, section 7 provides, in pertinent part, that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art. IX, § 7. In making a determination as to whether a particular payment is a penalty for purposes of article IX, section 7, "the label attached to the money is not controlling." *Moore*, 359 N.C. at 487, 614 S.E.2d at 512 (citing *Cauble v. City of Asheville*,

301 N.C. 340, 271 S.E.2d 258 (1980); *State v. Rumfelt*, 241 N.C. 375, 85 S.E.2d 398 (1955); *Bd. of Sch. Dirs. v. City of Asheville*, 128 N.C. 249, 38 S.E. 874 (1901); and *Bd. of Educ. v. Town of Henderson*, 126 N.C. 689, 36 S.E. 158 (1900)). Instead, the "determinative" or "critical" question is whether the alleged " 'civil penalty' is punitive or remedial in nature" or, put another way, "whether the penalty mandated for violation of the statute is imposed as punishment to deter noncompliance or to measure the damages accruing to an individual or class of individuals resulting from the breach." *Id.* at 512–13, 614 S.E.2d at 488 (citing *Remedial*, *Black's Law Dictionary* (6th ed. 1990)). In applying this basic standard to funds collected relating to environmental enforcement, this Court has held that money paid to support a Supplemental Environmental Project as a full or partial substitute for an environmental noncompliance penalty was a penalty for purposes of article IX, section 7, given that

> [t]he payment would not have been made had [the Department of Environmental Quality] not assessed a civil penalty against [the violator] for violating a water quality law. To suggest that the payment was voluntary is euphemistic at best. Moreover, the money paid under the [Supplemental Environmental Project] did not remediate the specific harm or damage caused by the violation even though a nexus may exist between the violation and the program [funded by the payment]. The payment was still punitive in nature. Nor is the nature of the payment by the City of Kinston or any other violator altered by its being made to a third party pursuant to a policy promulgated by [the Department of Environmental Quality] in an attempt to circumvent the statutory and constitutional requirement that the clear proceeds of civil penalties be paid to the Civil Penalty and Forfeiture Fund.

Id. at 509, 614 S.E.2d at 525. Similarly, this Court held in *Craven Cty. Bd. of Educ. v. Boyles*, 343 N.C. 87, 92, 468 S.E.2d 50, 53 (1996), that monies paid to settle proceedings initiated for the purpose of enforcing environmental standards constituted penalties subject to article IX, section 7, stating that "it is not determinative that the monies were collected by virtue of a settlement agreement" or that the parties "stated that the payment [was] not [to] be construed as a penalty" given that "[t]he monies were paid to settle the assessments of a penalty for violations of environmental standards." As a result, the ultimate question before this Court is whether the payments made pursuant to the agreement, construed in realistic, rather than nominal terms, were intended to punish

Smithfield and its subsidiaries for committing one or more environmental violations or to serve some other purpose.

The language in which the agreement is couched clearly demonstrates that the payments at issue in this case were not intended to punish Smithfield and its subsidiaries for any specific environmental violation or to deter them from committing any future environmental violation. On the contrary, the agreement provides, in pertinent part, that:

> [Smithfield and its subsidiaries] have entered into this binding [a]greement freely for the purpose of memorializing the commitments they have voluntarily agreed to undertake . . . .
>
> [Smithfield and its subsidiaries] acknowledge that the Attorney General, in consultation with [the Department of Environmental Quality], will undertake a comprehensive review of the operation of the swine industry in North Carolina to ensure that [Smithfield and its subsidiaries] and other integrators and operators of swine facilities are taking all appropriate steps, and have adopted compliance assurance systems, to ensure that they remain at all times in compliance with the law . . . .
>
> Nothing in this [a]greement shall be construed to in any way limit State or private enforcement against [Smithfield and its subsidiaries] for past, present, or future violations of law . . . . This [a]greement shall not be construed as a settlement of any liability of [Smithfield and its subsidiaries] for penalties, fines, damages or other liability.
>
> . . . .
>
> Nothing in this [a]greement shall relieve [Smithfield and its subsidiaries] of their responsibility to comply with applicable law . . . .

Thus, the agreement specifically provides that the commitments made by Smithfield and its subsidiaries do not effect a settlement of any liability that might arise from any past environmental violation or have any effect upon any enforcement action that might be taken by the Department of Environmental Quality in the event that any environmental violation occurs in the future.[6]

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6. The fact that sections III.A.1.b and III.A.1.d of the agreement provide that Smithfield and its subsidiaries will submit plans that "identif[y] those Company-owned

Consistently with the general terms in which the agreement is couched, the specific payments at issue here, unlike those that the Court deemed to be penalties in *Moore* and *Boyles*, do not stem from an enforcement proceeding in which the Department of Environmental Quality or some other state agency attempted to assess a penalty for the purpose of punishing a past environmental violation or deterring future violations before accepting a payment from the alleged violator to either an agency of the State or some other entity in full or partial satisfaction of a civil penalty that would have otherwise become due and owing. On the contrary, the agreement was not, by its own terms, tied to any particular violations of the environmental laws. In addition, the undisputed evidence forecast by the Attorney General tends to show that no existing settlement actions were disposed of as a result of the decision of Smithfield and its subsidiaries to enter into the agreement and that no State agency or official, including the Department of Environmental Quality or the Attorney General, has refrained from seeking the imposition of a penalty for any environmental violation that occurred after the date upon which the agreement was entered into. In light of the language in which the agreement is couched, there is no evidence in the present record tending to show that Smithfield and its subsidiaries made the payments contemplated under the agreement in lieu of paying a penalty for specific violations of an environmental standard.

In seeking to persuade us that the payments contemplated under the agreement were, in fact, the functional equivalent of a civil penalty, the Board of Education advances a number of arguments, none of which we find persuasive. For example, the Board of Education argues that an examination of the Department of Environmental Quality's enforcement records relating to Smithfield and its subsidiaries indicates that the Department of Environmental Quality began "going light" on them after the agreement was entered into and that this information permits a reasonable inference that the agreement did, in fact, serve as a substitute for penalties that would have been assessed against Smithfield

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Farms that have the potential to adversely impact water quality due to deficient site conditions or operating practices and a description (together with expeditious implementation schedules) of proposed measures to correct such deficiencies or operating practices" and "identif[y] all abandoned lagoons on Company-owned Farms and a description (together with expeditious implementation schedules) of proposed measures for closure of the lagoons on Company-owned Farms in accordance with current NRCS and [Department of Environmental Quality] standards and consistent with [the Department of Environmental Quality's] most current priority list" does nothing to undercut the conclusion set out in the text. Simply put, nothing in the record shows that the actions delineated in these provisions of the agreement, which are explicitly stated to be remedial in nature, involve the sanctioning of violations of legally-enforceable environmental standards.

and its subsidiaries. However, given that the Board of Education has not shown what level of enforcement would have been appropriate in light of the level of compliance with the environmental laws exhibited by Smithfield and its subsidiaries after the date upon which the agreement was executed, we are unable to say that the Board of Education's argument is anything more than an exercise in speculation or conjecture. *See Dickens v. Puryear*, 302 N.C. 437, 457, 276 S.E.2d 325, 337 (1981) (stating that, where the plaintiff "in essence relies on the allegations . . . in his complaint and possible speculation or conjecture[,]" such information "is not enough to survive [the defendant's] motion for summary judgment"). Such a deficiency in the record precludes reliance upon rhetorical questions asking what considerations might have motivated Smithfield and its subsidiaries to enter into the agreement if it was not intended to avoid or lessen future penalty payments.

Similarly, the Board of Education directs our attention to portions of a letter written by counsel for Smithfield and its subsidiaries following the execution of the agreement in which the benefits of the agreement to Smithfield and its subsidiaries are said to include the ability to proactively "correct[ ] deficiencies *before* they become enforcement problems." However, instead of suggesting that the agreement settled future enforcement actions by providing for a payment that constituted the functional equivalent of a penalty, the relevant portion of counsel's letter actually demonstrates that the agreement did not address or settle any environmental violations that had previously occurred and that the agreement was intended, instead, to help correct deficiencies that could lead to future enforcement actions. In other words, counsel's letter described the agreement as having a remedial and preventative, rather than a punitive, purpose.

In a related argument, the Board of Education directs our attention to the fact that the Attorney General referred to the agreement in two different press releases as a "settlement" and argues that the Attorney General's settlement authority is limited to compromising an enforcement action. However, we believe that the Board of Education puts more weight on this argument than it will reasonably bear. As we have previously stated, "it is neither 'the label attached to the money' nor 'the [collection] method employed,' but 'the nature of the offense committed' that determines whether the payment constitutes a penalty." *Boyles*, 343 N.C. at 92, 468 S.E.2d at 53 (quoting *Cauble*, 301 N.C. at 344, 271 S.E.2d at 260); *see also Moore*, 359 N.C. at 510, 614 S.E.2d at 526 (stating that "the terms and descriptions [that the Department of Environmental Quality] and a violator use to refer to a payment are not determinative"

(citing *Boyles*, 343 N.C. at 92, 468 S.E.2d at 53)). Regardless of whether the agreement represents a "settlement" or something else entirely, the relevant issue for purposes of this case is whether the payments provided for in the agreement constitute the functional equivalent of penalties, rather than the way in which the parties characterize them. In other words, the relevant issue for purposes of this case not whether the agreement involves a gift or a settlement; instead, the relevant issue is whether the payments at issue here constitute penalties. And, as we have previously indicated, the record does not contain any evidence tending to show that the payments made pursuant to the agreement have served to either settle any particular enforcement action or as the functional equivalent of a penalty and does contain a considerable amount of evidence pointing in the opposite direction.

Finally, the Board of Education's assertion that Smithfield and its subsidiaries had no incentive to enter into the agreement if acting in that fashion did not somehow offset some current or future liability rests upon a misunderstanding of the applicable legal test, which focuses upon the purpose for which the relevant payment was made rather than the subjective intentions of the persons or entities involved in the making of that payment. In order for a particular payment to constitute a "penalty" as that term is used in article IX, section 7, both the payor and the regulatory agency must understand that the payment in question is the functional equivalent of a penalty to which the payor would be exposed as a result of an environmental violation. In the absence of an express or implied agreement on the part of the regulatory agency that the payment will, in fact, be treated in that fashion, the mere fact that the payor subjectively hopes that its actions will have the effect of reducing the severity with which the regulatory agency views any violation that it might commit in the future is simply not sufficient to convert that payment into a penalty for purposes of article IX, section 7.

Thus, for all of these reasons, we hold that the Court of Appeals erred by determining that the record disclosed the existence of genuine issues of material fact that precluded the entry of summary judgment in favor of either party and remanding this case to the Superior Court, Wake County, for a trial on the merits. In addition, we hold that the trial court correctly decided to enter summary judgment in favor of the Attorney General on the grounds that the payments contemplated by the agreement did not constitute penalties for purposes of article IX, section 7.[7] As a result, we reverse the decision of the Court of Appeals and remand

7. Any argument that the agreement is invalid because it rests upon a violation of article I, section 6 of the North Carolina Constitution (providing that "[t]he legislative,

this case to the Court of Appeals for any additional proceedings not inconsistent with this opinion.[8]

REVERSED AND REMANDED.

Justice NEWBY dissenting.

According to the Attorney General, the multi-million-dollar agreement reached with Smithfield is not a settlement, even though it references regulatory deficiencies for which the State presumably could have held Smithfield responsible. We are asked to believe instead that Smithfield regarded its potential payments totaling $50 million over twenty-five years as nothing more than a gift that the Attorney General would use in his sole discretion to fund grants to environmental groups. The undisputed facts of this case, especially when viewed in light of controlling legal precedent, reveal that the $50 million is not a gift. The agreement is a settlement, drafted to circumvent the North Carolina Constitution's requirement that the money proceeds of fines and penalties go to the public schools. Furthermore, if the agreement is not a settlement, it violates our state constitution's separation-of-powers

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executive, and judicial powers of the State government shall be forever separate and distinct from each other") by impermissibly infringing upon the General Assembly's constitutional taxing authority is not properly before this Court. No such arguments were made before the trial court, the Court of Appeals, or this Court, and we decline to deviate from our long-standing refusal to address constitutional issues that were not presented to the lower court by reaching out to decide that issue in this case. *Dennis v. Duke Power Co.*, 341 N.C. 91, 103, 459 S.E.2d 707, 715 (1995) (stating that "[i]t is a well[-]established rule of this Court that it will not decide a constitutional question which was not raised or considered in the court below" (quoting *Johnson v. Highway Commission*, 259 N.C. 371, 373, 130 S.E.2d 544, 546 (1963))). As a result, we express no opinion concerning the merits of any separation of powers challenge that might be advanced in opposition to the lawfulness of the agreement that is before us in this case.

8. On 18 November 2019, Governor Roy Cooper signed 2019 N.C. Sess. Laws 250 into law. The relevant session law amended N.C.G.S. § 147-76.1 so as to provide, in pertinent part, that, "[e]xcept as otherwise specifically provided by law, all funds received by the State, including cash gifts and donations, shall be deposited into the State treasury," N.C.G.S. § 147-76.1(b), and that, "[e]xcept as otherwise provided by subsection (b) of this section, the terms of an instrument evidencing a cash gift or donation are a binding obligation of the State[, with] [n]othing in this section [to] be construed to supersede, or authorize a deviation from the terms of an instrument evidencing a gift or donation setting forth the purpose for which the funds may be used." N.C.G.S. § 147-76.1(c). Although 2019 N.C. Sess. Laws 250, § 5.7.(c) provided that newly-enacted N.C.G.S. § 147-76.1 became effective on 1 July 2019, and would be applicable to all funds received on or after that date, the parties agreed that the provisions of newly-enacted N.C.G.S. § 147-76.1 have no bearing upon the proper resolution of this case. As a result, we will refrain from attempting to construe N.C.G.S. § 147-76.1 or to apply its provisions to the facts of this case.

principle by invading the General Assembly's policymaking and budgetary prerogatives in a way that invites other constitutional officers to create and manage programs funded by "gifts" received from the very companies they police. Because this agreement is a settlement, not a gift, I respectfully dissent.

The circumstances leading to this agreement aid in understanding its true nature. Severe flooding of swine farms in the 1990s brought about environmental challenges. Ruptured and flooded swine waste lagoons spilled millions of gallons of waste into the State's waterways and groundwater. Smithfield was among the largest companies in the swine industry; in the late 1990s, it received at least forty-five notices of violation of environmental laws and regulations from the Department of Environmental Quality (DEQ, formerly the Department of Environment and Natural Resources).

On 25 July 2000 then-Attorney General Michael F. Easley made an agreement with Smithfield and some of its subsidiaries (collectively, Smithfield) in which Smithfield agreed to, among other things, immediately take measures to enhance environmental protection on its farms, commit $15 million towards the development of advanced technologies for dealing with environmental hazards like swine waste, install these technologies on its farms, and cooperate with the Attorney General to ensure compliance with environmental laws. The agreement established a timeline for Smithfield to address many of its environmental issues. For example, it allowed Smithfield until 15 October 2000 to submit a plan to correct "deficient site conditions or operating practices" at some of its farms and until 15 December 2000 to submit a plan to shut down its abandoned lagoons. Most significantly to this case, Smithfield promised to contribute up to $50 million over twenty-five years towards "environmental enhancement" activities administered at the discretion of the Attorney General. After the agreement was made, the Attorney General's office referred to it as a "settlement" multiple times in press releases.

The Attorney General, in his discretion, administers the $50 million fund as follows: Smithfield deposits the payments for environmental enhancement activities in an escrow account, from which funds are then paid out to organizations, at the direction of the Attorney General, for environmental projects. The Attorney General created the "Environmental Enhancement Grants Program." Governmental and nonprofit entities may apply for grants from the program and a panel made up of individuals from the Department of Justice, DEQ, the Department of Natural and Cultural Resources, and certain nongovernmental entities reviews the applications. The panel, as well as a Smithfield

representative, recommends to the Attorney General how grants should be dispersed, but the Attorney General makes the ultimate decision. Since the agreement was made, the Attorney General has awarded more than $25 million in grants through this program. The program continues to operate today, with millions of dollars more to be distributed.

The majority decides that the $50 million Smithfield promised to pay for the Attorney General's grant program is not a settlement payment for two primary reasons. First, one section of the agreement provides that the agreement has no effect on the Attorney General's ability to resolve current enforcement actions or bring new ones. Second, there is no evidence that Smithfield obtained the dismissal of any outstanding enforcement action brought against it as a result of the agreement. Certainly these considerations should factor into the analysis of the agreement's nature, but they do not capture the entire story.

The agreement must be viewed as a whole for its true effect, notwithstanding how the agreement's isolated provisions or the agreement's parties characterize it. *See Cauble v. City of Asheville*, 301 N.C. 340, 344, 271 S.E.2d 258, 260 (1980) (explaining that, as to the question about whether funds are derived from penalties and so reserved for education, this Court has "often stated that the label attached to the money does not control"). When viewed in its entirety, the agreement reveals that Smithfield promised millions of dollars to the Attorney General in exchange for leniency in enforcing State environmental laws and regulations. The $50 million is therefore a payment in lieu of penalties, subject to Article IX, Section 7's requirement that the funds go to the State's public schools. *See* N.C. Const. art. IX, § 7.[1] The agreement's provision explaining that it should not be viewed in this way does not change the agreement's substance.

This case is not unique. Indeed, our case law applying Article IX, Section 7 has developed over time in response to attempts by state and local governmental entities to circumvent the State constitutional requirement that proceeds from fines or penalties inure to benefit of public schools. In *Cauble* citizens of the City of Asheville paid funds for parking citations they received from the City. 301 N.C. at 342, 271 S.E.2d at 259. The City argued that the funds were not fines subject to Article IX, Section 7 because, among other things, the citizens paid the funds

1. Article IX, Section 7 of the North Carolina Constitution declares that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, . . . shall be faithfully appropriated and used exclusively for maintaining free public schools."

"voluntarily" after receiving a citation; they were not assessed after a criminal conviction. *Id.* at 343–44, 271 S.E.2d at 260. The Court disagreed and held that the funds were subject to Article IX, Section 7. *Id.* at 345, 271 S.E.2d at 261. The central question in cases like that one, the Court said, is not "whether the monies are denominated 'fines' or 'penalties' " because "the label attached to the money does not control." *Id.* at 344, 271 S.E.2d at 260. It explained that "[t]he crux of the distinction lies in the nature of the offense committed, and not in the method employed by the municipality to collect fines for commission of the offense." *Id.*

In response to the Court's ruling in *Cauble*, the Department of Environment, Health and Natural Resources (DEHNR) ventured a different argument in *Craven County Board of Education v. Boyle*s, 343 N.C. 87, 468 S.E.2d 50 (1996). In that case, DEHNR assessed a penalty against a company for violating air pollution standards. *Id.* at 88, 468 S.E.2d at 51. DEHNR and the company eventually made a settlement agreement under which payments were not to "be construed as forfeitures, fines, penalties, or payments in lieu thereof." *Id.* at 89, 468 S.E.2d at 51. Despite the language of the agreement, the Court explained that because the payments arose from an environmental enforcement action against the payor, the funds were proceeds from penalties and thus subject to Article IX, Section 7. *Id.* at 92, 468 S.E.2d at 53.

In due course, the Department of Environment and Natural Resources (DENR), DEHNR's successor, tried another argument to avoid Article IX, Section 7 in *North Carolina School Boards Association v. Moore*, 359 N.C. 474, 614 S.E.2d 504 (2005). In that case, DENR assessed a penalty against the City of Kinston, but eventually remitted the penalty altogether. *See id.* at 509–10, 614 S.E.2d at 525. Instead, the parties made an agreement under which the City of Kinston paid money to the State's "Supplemental Environmental Project." *Id.* at 508, 614 S.E.2d at 524–25. Nonetheless, the Court held the payment was a settlement of penalties despite the State's assertion that the payments were voluntary and remedial in nature. *Id.* at 508–10, 614 S.E.2d at 524–26. Because the payment would not have been made had DENR not assessed a penalty against the City of Kinston, the Court stated it would be "euphemistic at best" to say the payment was voluntary. *Id.* at 509, 614 S.E.2d at 525.

This case represents perhaps the most creative effort yet to avoid Article IX, Section 7. The Attorney General argues that the agreement at issue falls outside that provision because it did not resolve any outstanding civil penalties assessed against Smithfield. Though the agreement resolved no such penalties, a fair reading of the document shows that, as consideration for its $50 million promise, Smithfield received time to

correct regulatory deficiencies that otherwise could have resulted in the imposition of further penalties. For example, in subsection III(A)(1)(b), the agreement gave Smithfield until 15 October 2000 to submit a plan to correct "deficient site conditions or operating practices" at some of its farms. "Deficient" sites indicate that those sites fell below the lawful standards. So, the agreement appears to have allowed Smithfield nearly three months to submit a plan to correct conditions for which the Attorney General presumably could have immediately brought an enforcement action. Similarly, subsection III(A)(1)(d) of the agreement allowed Smithfield until 15 December 2000 to submit a plan to shut down its abandoned lagoons; it thus granted Smithfield nearly five months to submit a plan to correct conditions for which the Attorney General could bring an enforcement action immediately, assuming the abandoned lagoons presented an unlawful environmental hazard.[2]

There simply is no good reason to believe that Smithfield would have entered into the agreement had the deficiency provisions not been part of the document. In support of his position, the Attorney General points to language near the end of the document which states that the agreement should not be interpreted to limit State enforcement "for past, present, or future violations of law . . . ." That language is no more dispositive than the provision in the *Boyles* settlement agreement that described the company's settlement payments as something other than a fine, penalty, or forfeiture. As this Court did in *Boyles*, we should refuse to take at face value a single settlement provision that is at odds with the plain intent of the parties and that appears designed to deny the public schools funds owed to them under Article IX, Section 7.

The Attorney General's effort to portray Smithfield's payments as a gift creates a Catch-22. At oral argument, when asked how the section under which Smithfield promised to pay money is enforceable, the Attorney General asserted that the funds are an enforceable charitable gift. It is, however, a longstanding principle of contract law that a gift is not generally enforceable unless it is given for consideration. *See*, *e.g.*, *Picot v. Sanderson*, 12 N.C. (1 Dev.) 309, 309 (1827) (explaining that a transaction was "a mere contract or agreement to give, which, being without consideration, cannot be enforced"). In other words, a "gift" is enforceable when the "giver" gets something in return—that is, when

2. Counsel for the Attorney General admitted at oral argument that much of the agreement functioned to help Smithfield come into compliance with State law. This statement presumes that some of Smithfield's facilities violated the law at the time the agreement was made. The agreement thus secured for Smithfield an alternative to the standard enforcement process.

the gift is not truly a gift at all. If the payments really are a gift, they are unenforceable. If they are not a gift, then they are part of a settlement agreement involving the enforcement of state law and therefore subject to Article IX, Section 7.

Because the best reading of the whole agreement shows that Smithfield secured favor from the Attorney General regarding Smithfield's noncompliant practices, the funds promised by Smithfield are not a gift. It does not matter that no outstanding enforcement action was dismissed by the Attorney General because of the agreement. The function of the agreement viewed objectively is to secure leniency by the regulators in favor of the regulated party, Smithfield. Because of the potential of future enforcement actions against Smithfield, it is, like it was in *Moore*, "euphemistic at best" to say that Smithfield voluntarily made a gift out of pure good will. The agreement appears artfully drafted based on this Court's precedent on penalties, but the substance of the agreement shows through nonetheless. Given the binary choice presented in this case—a gift or a settlement in lieu of penalties—the funds should be classified as a settlement and thus directed to the Civil Penalties and Forfeiture Fund. This classification is consistent with how the Attorney General's office has characterized the agreement.

Indeed, if the agreement with Smithfield is *not* a settlement, the Attorney General lacked authority to make the agreement. The majority states that this Court need not resolve the question of the Attorney General's authority in this case. I disagree.[3] The issue is not only critically important to the State's public interest and jurisprudence, but plaintiff also adequately presented it, arguing that the agreement *must*

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3. The majority asserts that plaintiff does not have standing to challenge the Attorney General's authority to make the agreement because the existence of the agreement does not harm plaintiff.

First, I do not think standing is a bar to considering this issue because plaintiff does not actually claim the agreement is invalid; it simply argues the agreed upon payments must be a settlement if the agreement is to be considered valid. This argument is not a separate claim for which a plaintiff must show standing. It is an additional argument supporting the central claim, which plaintiff has standing to assert.

Second, as to the substance of the standing issue, generally, any person may bring an action alleging a separation of powers violation if they can show any injury, even if the injury is the same as that suffered by the rest of the public. We have recognized causes of action arising directly under the North Carolina Constitution to vindicate rights secured by the Declaration of Rights. *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290, *cert. denied*, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992). The Declaration of Rights provides, among many other things, that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each

involve settlement in lieu of penalties if the agreement is to be a valid exercise of the Attorney General's powers.

The General Assembly has decided that the Attorney General should have all the "powers of the Attorney General that existed at the common law, *that are not repugnant to or inconsistent with the Constitution* or laws of North Carolina." N.C.G.S. § 114-1.1 (2019) (emphasis added). Specifically, it gave the Attorney General the duty to represent the interests of the State in legal proceedings, N.C.G.S. § 114-2 (2019), and authority regarding settlements to which the State is a party, N.C.G.S. § 114-2.1, -2.4 (2019). The Attorney General thus appears to have the authority to settle legal claims that the State may have against private parties, or that private parties may have against the State.

The Attorney General's central argument in this case, however, is that the agreement is not a settlement. If that is true, as the majority concludes, then the Attorney General must find another basis for his authority to make such an agreement.

The Attorney General argues that he has special authority to make the agreement because he is the State's "chief legal advisor," and he has the authority to accept gifts on the State's behalf. The title of "chief legal advisor," he says, gives him the authority to manage all the State's legal affairs, which is not limited to litigation. Specifically, he claims, the Attorney General has "plenary authority to act in the interests

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other." N.C. Const. art. I, § 6. In this case, plaintiff may have been injured by a separation of powers violation by the Attorney General because one conceivable result of the Attorney General's actions is that money that could have been extracted as a penalty, and so directed to supporting education, is instead extracted as a "gift" for environmental enhancement.

This Court should consider the Attorney General's authority in this case. The result of the majority's decision that the agreement does not involve settlement payments in lieu of penalties means that both the agreement and the Attorney General's grant program remain intact and active. The Court thus allows a potentially invalid exercise of governmental power to go unchecked indefinitely. Furthermore, if, as the majority says, these payments are not in settlement of any wrongdoing, past or future, then what is the true nature of the agreement? The agreement at least appears to involve the Attorney General accepting gratuitous payments from entities against which the Attorney General should be enforcing regulations. Can a regulated party give gifts to the regulator without the public seeing the payments as being *for something*? By upholding such a scheme, the majority invites mischief, and the public has an interest in curtailing such mischief. In addition, Smithfield will continue to pay millions into the fund for at least the next five years. Because of the agreement, these substantial funds go into the Attorney General's preferred grant program rather than into any other public fund. The public thus has an interest in the extent of the Attorney General's powers. Because the Attorney General's authority and the nature of this State's separation of powers principle are critical to the public interest and to the State's jurisprudence, this Court should address those issues now.

of the public, including non-litigation efforts 'to enforce the state's statutes.' " (quoting 7 Am Jur. 2d *Attorney General* § 5, at 10 (2017)).

It is simply incorrect that the Attorney General has "plenary authority to act in the interests of the public." The separation of powers principle of the North Carolina Constitution makes that clear. The Attorney General should act in the public interest, but he may not exercise legislative power to do so. And even if the Attorney General has the power to engage in "non-litigation efforts to enforce the state's statutes," that power is not broad enough to vindicate his actions here if the payments are not a settlement in lieu of penalties. Under the majority's and the Attorney General's view, neither the agreement nor the grant program "enforces" any State statute. The Attorney General in fact argues that the agreement was not a penalty or settlement resulting from any violation of the law. It is, instead, part of a policy initiative to conserve the State's natural environment. The initiative may be commendable, but it does not enforce the State's laws. If the agreement does not involve settlement of penalties, it involves legislative policy considerations, a role constitutionally reserved for the General Assembly.

Searching for statutory authority, the Attorney General also argues he has power to "accept gifts on behalf of the State" under N.C.G.S. § 138A-32(f)(5) (2019). Obviously intended as an anti-corruption measure, section 138A-32 imposes restrictions on the solicitation and receipt of gifts by certain state officials and employees. Subsection (f)(5) merely states that the statute's restrictions do not apply in the case of gifts "accepted on behalf of the State for use by the State or for the benefit of the State." The best reading of this provision is that, *if* a governmental official may otherwise accept a gift for the State, section 138A-32 does not prohibit the official from doing so. Subsection (f)(5) does not give the Attorney General or other officials authority they would not otherwise have to accept gifts on the State's behalf.

Moreover, under the agreement and grant program, the Attorney General does not simply accept the funds on the State's behalf, he accepts them for his separate fund, and decides precisely how the money should be used. He, in accordance with the agreement, has decided that the funds should be deposited into a specific escrow account, and he has the final say about who receives grants from that fund. The purpose of subsection (f)(5) is to enable public servants, legislators, or legislative employees to accept gifts for the good of the State without violating ethical rules. The General Assembly, in passing that provision, could not have intended those officials and employees to have the authority to unilaterally decide exactly how the State's gift should be used.

That is a strikingly broad power which falls squarely within the General Assembly's policymaking purview alone.

Without a specific statutory provision to grant the Attorney General the authority to fund and establish the grant program, the actions of the Attorney General in this case violate the separation of powers principle as well. The North Carolina Constitution provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. The legislative power belongs to the General Assembly. N.C. Const. art. II, § 1 ("The legislative power of the State shall be vested in the General Assembly . . . ."). No governmental entity other than the General Assembly may exercise a power that is uniquely legislative. Any usurpation of the legislative power by the executive branch, regardless of intent, is an exercise of powers in violation of the North Carolina Constitution.

By entering into this agreement and creating and operating the grant program the Attorney General has unconstitutionally exercised legislative power. The levying of funds received from private entities is a quintessentially legislative power. References to such power in the North Carolina Constitution refer to powers, or limitations of power, of the General Assembly. *See*, *e.g.*, N.C. Const. art. II, § 24(1)(k); N.C. Const. art. V, §§ 1, 2, and 5. The Constitution does not grant any similar power to the Attorney General or any other executive branch member. In fact, the Constitution specifically provides that the *General Assembly* may pass laws to allow other entities to appropriate funds for public purposes. *See* N.C. Const. art. V, § 7. Thus, any executive action extracting funds from private entities violates the separation of powers principle of this State unless authorized by the General Assembly. The Attorney General's agreement is unconstitutional if the payments constitute a gift instead of a settlement. The entering of the agreement and operating the grant program cannot, then, fall under the Attorney General's power, which extends only to those actions which are not "repugnant to or inconsistent with the Constitution or laws of North Carolina." N.C.G.S. § 114-1.1.

Under the Attorney General's argument, every Council of State member could "encourage" "gifts" from those entities that they regulate and redirect those gifts to each member's preferred recipients. In doing so, each member could effectively "tax" the regulated entities to fund the member's own policy initiatives, thereby circumventing the General Assembly. This usurpation of legislative authority would clearly be unconstitutional. Moreover, such governmental actions could suggest impropriety, inviting the onlooking public to question whether those

regulated entities that participate in the "gift" programs sponsored by regulators will be treated the same as those that do not.

The Attorney General's agreement with Smithfield is a settlement for purposes of Article IX, Section 7. The public schools are therefore entitled to the clear proceeds of Smithfield's settlement payments. If, as the Attorney General insists, the agreement is not a settlement, it constitutes an unauthorized and unconstitutional usurpation of powers that properly belong to the legislature. I therefore disagree with the majority's decision to let the agreement stand.

I respectfully dissent.

PHG ASHEVILLE, LLC, PETITIONER
v.
CITY OF ASHEVILLE, RESPONDENT

No. 434PA18

Filed 3 April 2020

1. Zoning—conditional use permit—denied by city council—standard of review by superior court

A trial court used the correct standards when reviewing a city council's denial of a conditional use permit for a hotel, including reviewing de novo the issue of whether the hotel developer made the necessary prima facie showing that it presented competent, material, and substantial evidence tending to satisfy the standards set forth in the city's unified development ordinance.

2. Zoning—conditional use permit—prima facie entitlement—sufficiency of evidence

A hotel developer seeking a conditional use permit presented competent, material, and substantial evidence tending to show it satisfied the standards set forth in the city's unified development ordinance by presenting three expert witnesses and their respective reports regarding the impact of the project on adjoining properties and traffic.

3. Zoning—conditional use permit—prima facie showing by applicant—authority of city to deny permit

Upon a prima facie showing by a hotel developer that it met its burden of production by presenting competent, material, and

substantial evidence tending to show it satisfied the standards set forth in the city's unified development ordinance, the city had no authority to deny the permit in the absence of a similar level of evidence in opposition. Although a city council may rely on special knowledge of local conditions, the questions raised in this case by council members were not sufficient to justify a finding that the developer had not met its burden.

4. Zoning—conditional use permit—unified development ordinance—city bound by standards

The Supreme Court rejected an argument by a city that its denial of a conditional use permit for a hotel was proper pursuant to *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1 (2002). In this case, the city council was bound by the standards set forth in the city's unified development ordinance, and an applicant that has presented competent, material, and substantial evidence that it has satisfied those standards has made a prima facie case that it is entitled to issuance of a permit.

Justice EARLS dissenting.

Justice HUDSON joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 822 S.E.2d 79 (N.C. Ct. App. 2018), affirming an order entered on 2 November 2017 by Judge William H. Coward in Superior Court, Buncombe County. Heard in the Supreme Court on 6 January 2020.

Fox Rothschild LLP, by Kip D. Nelson and Thomas E. Terrell, Jr., for petitioner-appellee.

Poyner Spruill LLP, by Andrew H. Erteschik, Chad W. Essick, Nicolas E. Tosco, Colin R. McGrath, and N. Cosmo Zinkow, for respondent-appellant.

ERVIN, Justice.

The question before us in this case is whether the City of Asheville properly denied an application for the issuance of a conditional use permit submitted by PHG Asheville, LLC, seeking authorization to construct a hotel in downtown Asheville. The trial court and the Court of

Appeals both held that the City had improperly concluded that PHG had failed to present competent, material, and substantial evidence tending to show that the proposed hotel satisfied the standards for the issuance of a conditional use permit set out in the City's unified development ordinance. In seeking relief before this Court, the City argues that the Court of Appeals ignored this Court's precedents concerning the manner in which applications for the issuance of conditional use permits should be evaluated, incorrectly applied the applicable standard of review, and erroneously disregarded the City's findings of fact. After carefully reviewing the record, briefs, and arguments of the parties, we conclude that PHG presented competent, material, and substantial evidence that the proposed hotel satisfied the relevant conditional use permit standards set out in the City's unified development ordinance and that the record did not contain any competent, material, and substantial evidence tending to establish that the proposed development failed to satisfy the applicable ordinance standards. Therefore, the City lacked the authority to deny the requested conditional use permit. As a result, we affirm the Court of Appeals' decision.

On 27 July 2016, PHG submitted a conditional use permit application to the City's planning department in which it requested authorization to construct an eight-story, 185-room, 178,412 square-foot hotel and an adjoining structure containing 200 parking spaces on a tract of real property located at 192 Haywood Street. The 2.05-acre tract upon which the proposed hotel was to be located was contained in the Patton/River Gateway portion of the "Central Business District," which is outside the "Traditional Downtown Core." According to the Downtown Master Plan that the City had adopted in March 2009, the Patton/River Gateway area "should . . . accommodate significant residential and extended-stay hotel development," with "some [of this development to occur] in taller buildings."

As a result of the size of the proposed development and its presence in the Downtown Design Review Overlay portion of the Central Business District, section 7-5-9.1 of the City's unified development ordinance required PHG to undertake a Level III site plan review of the project. The Level III site plan review process required the holding of a pre-application conference involving area representatives; staff review of the application; and review by the Technical Review Committee, the Downtown Commission, and the Planning and Zoning Commission prior to final review by the Asheville City Council. The Technical Review Committee and the Downtown Commission each recommended approval of the project subject to variances to be approved by the Planning and Zoning

Commission and the making of certain modifications to the project by PHG. The Planning and Zoning Commission granted two variances relating to the project that modified the proposed lot frontage and the height of the street wall before unanimously recommending approval of the conditional use permit to the City Council.

On 24 January 2017, PHG's application for a conditional use permit came before the Asheville City Council for a quasi-judicial public hearing. According to Section 7-16-2 of the City's unified development ordinance:

> (c) *Conditional use standards.* The Asheville City Council shall not approve the conditional use application and site plan unless and until it makes the following findings, based on the evidence and testimony received at the public hearing or otherwise appearing in the record of the case:
>
> (1) That the proposed use or development of the land will not materially endanger the public health or safety;
>
> (2) That the proposed use or development of the land is reasonably compatible with significant natural and topographic features on the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant;
>
> (3) That the proposed use or development of the land will not substantially injure the value of adjoining or abutting property;
>
> (4) That the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located;
>
> (5) That the proposed use or development of the land will generally conform with the comprehensive plan, smart growth policies, sustainable economic development strategic plan, and other official plans adopted by the city;
>
> (6) That the proposed use is appropriately located with respect to transportation facilities, water

> supply, fire and police protection, waste disposal, and similar facilities; and
>
> (7) That the proposed use will not cause undue traffic congestion or create a traffic hazard.

At the hearing before the City Council, PHG presented the testimony of three expert witnesses, including Tommy Crozier, a licensed real estate appraiser with over fifteen years' experience in conducting property appraisals, and Kevin Dean, a registered professional engineer.

In his testimony, Mr. Crozier addressed the third standard set out in the City's ordinance, which required consideration of whether the proposed hotel would significantly injure the value of adjoining or abutting properties. Mr. Crozier testified that three properties adjoined the tract upon which the proposed hotel would be located, including an apartment building, a church, and a multi-center office building. According to Mr. Crozier, "the three adjoining properties are valued for tax purposes under $3 million," while the construction of the hotel would cost about $25 million. Mr. Crozier described the situation at issue in this case as a textbook example of the principle of progression, in which "lower valued properties are enhanced by the value of higher value[d] properties." On the basis of his examination of recent land sale transactions in the vicinity of the proposed hotel, Mr. Crozier opined that "values have increased substantially over the last few years" as a result of the construction of other hotels in the area. As a result, Mr. Crozier concluded that "[t]he proposed subject hotel will not impair the value of adjoining or abutting property" and "should meaningfully enhance the values of surrounding properties."

At the conclusion of Mr. Crozier's testimony, Vice Mayor Gwen Wisler asked Mr. Crozier whether he had considered comparable sales data involving transactions in other cities in which two hotels had been located within a quarter mile from a new hotel. After acknowledging that he had not included data of that nature in his report, Mr. Crozier stated that "there is so much demand for new hotel rooms in the market that [this new hotel] will not impact the value negatively of any of the hotels around here" in light of the fact that downtown hotel occupancy in Asheville is around 80 to 85 percent even though occupancy rates in an efficient market at equilibrium would be approximately 65 percent. For example, Mr. Crozier testified that, following the opening of the Hyatt Place in downtown Asheville, the business of the adjoining Hotel Indigo had increased by about ten percent.

In his testimony, Mr. Dean addressed the issue of whether construction and operation of the proposed hotel would result in any undue traffic congestion or create a traffic hazard. Mr. Dean testified that he had consulted with the City's traffic engineer, who had informed him that he only needed to provide a trip generation table and the anticipated distribution of those trips in order to satisfy the relevant ordinance requirement. Based upon the industry standards applicable to traffic studies, Mr. Dean determined that new traffic at nearby intersections resulting from the construction and operation of the proposed hotel would represent less than five percent of the total traffic that passed through that intersection and would only increase the overall traffic delay at nearby intersections by approximately four seconds. In order to make these determinations, Mr. Dean testified that he had "collected peak hour traffic counts on November 10th of [2016]" and "performed a trip generation for the site based on [the] Institute of Transportation Engineer[s'] data" and information generated by appropriate software. As a result, Mr. Dean concluded that "the proposed use will not cause undue traffic congestion or create a traffic hazard."

At the conclusion of Mr. Dean's testimony on direct examination, Councilman Cecil Bothwell asked Mr. Dean why he had based his analysis upon conditions experienced on November 10th, which was a Thursday, rather than conditions in the summer or in September or October, when Asheville experiences higher tourist-related traffic levels. In response, Mr. Dean testified that "traffic [studies] are only supposed to be counted between Tuesdays and Thursdays to get a typical weekday condition that's not affected by a Monday or Friday variation," that the use of this approach is "industry standard," and that traffic engineers are generally required to only conduct traffic assessments on Tuesdays through Thursdays. In addition, Councilman Bothwell questioned Mr. Dean about the queuing that already occurs at intersections near the hotel and whether the new entrance to the hotel would exacerbate existing conditions. After acknowledging that he could not argue with the Councilman Bothwell's "anecdotal stories," Mr. Dean stated that "the amount of traffic that's going to be added is only supposed to be [a] negligible increase to any [queues] that you would see" and will not "cause any undue additional issues."

Vice Mayor Wisler asked further questions about the time of day upon which Mr. Dean's study focused, about whether Mr. Dean had taken the times at which people check into and out of a hotel into account, and whether Mr. Dean had studied conditions in the summer, during which the City experienced its highest levels of traffic. In response, Mr. Dean

stated that he had collected the data upon which his study was based on "a typical weekday in November" by measuring traffic from 7:00 a.m. to 9:00 a.m. and from 4:00 p.m. to 6:00 p.m., periods which "generally represent[ ] the peak hour" of the streets that were at issue in his study. At that point, Vice Mayor Wisler asked whether Mr. Dean had taken Mr. Crozier's appraisal, which mentioned certain hotels and apartments that were either planned to be built or had just been added, into account in conducting his study. Mr. Dean replied by stating that he had not considered the information to which Vice Mayor Wisler alluded and that he had, instead, examined the impact of the proposed hotel upon existing traffic conditions. In addition, Mr. Dean stated that, if there is a higher amount of traffic near the hotel originating from sources other than the hotel itself than was contemplated in his study, the traffic resulting from the construction and operation of the hotel would constitute a smaller percentage of the overall traffic and have a smaller percentage impact upon overall traffic conditions.

Three members of the public spoke in favor of the approval of the conditional use permit. Another member of the public asked a procedural question without supporting or opposing the issuance of the permit. Charles Rawls, a native of Asheville and resident of the nearby Montford community, expressed uncertainty concerning whether he opposed the project and posed certain questions about traffic-related issues. With respect to the extent to which traffic would be entering and exiting the proposed parking deck onto North French Broad Road, Mr. Rawls commented that, "heading south on French Broad, there is a hill there that is a blind hill" that might create an issue for persons who lacked familiarity with the area. In addition, Mr. Rawls asked "how much of the traffic coming and going to that parking garage would be happening at peak hours so that it might affect the safety of the public" and whether Mr. Dean had observed the angle and sight limitations relating to that hill. In response, Mr. Dean stated that he had not seen that hill and that "[w]e did not conduct a sight distance check, which is typically what's required." According to Mr. Dean, the North Carolina Department of Transportation "typically requires driveways to meet certain sight distance requirements" and that he had not conducted the "check" in question because his firm had not been involved in designing the site. No one presented any evidence in opposition to the approval of the proposed conditional use permit.

After Mayor Esther Manheimer closed the evidentiary hearing, Vice Mayor Wisler immediately moved that PHG's conditional use permit application be denied on the grounds that the applicant had failed to

meet the first, second, third, fourth, fifth, and seventh standards set out in the City's unified development ordinance and Councilman Keith Young seconded the motion. At that point, Councilman Bothwell expressed agreement with the assertion that PHG had failed to satisfy the traffic-related standard and thanked Mr. Rawls for "discover[ing] the lack of the sight distance examination." At that point, the City Council voted unanimously to deny the conditional use permit application.

On 14 February 2017, the City entered a written order that contained forty-four findings of fact in support of its decision to deny the issuance of the requested conditional use permit on the basis of its failure to satisfy six of the seven standards set out in the City's unified development ordinance. Among other things, the City Council found as a fact that:

> 18. An appraiser, Tommy Crozier, testified on behalf of the Applicant and presented an "Expert Report," which purported to show that CUP Standard 3 was met, *i.e.*, that the development of the Hotel would "not substantially injure the value of adjoining or abutting property." However, Mr. Crozier's testimony and the Expert Report do not contain facts and data sufficient to prove that there would not be a substantial adverse impact on such values following construction of the Hotel.
>
> 19. Mr. Crozier's testimony and the Expert Report state generally, and the Council accepts as fact, that the values of property in this area of Asheville (northwest downtown) have been increasing in recent years, and that recent sales prices exceed the assessed tax values of properties in the area. There was, however, no evidence to establish the date of the tax appraisals or evidence that would indicate how these tax values would have any relevance to CUP Standard 3. There was no evidence, through facts and data, to indicate how the Hotel would affect or impact such an increase in value (assuming such an increase would continue) on the adjacent and adjoining properties.
>
> 20. There was no sales data presented and there are no comparable sales in the Expert Report, which provide information about the sale prices of properties adjacent to hotels in Asheville, or elsewhere, before and after a hotel was constructed on the tract in question. In fact, there was no data through, e.g., comparable sales, that

could show the before and after value of properties adjacent to any hotels in the City, even though the Expert Report indicates there have been multiple hotels constructed in the City in recent years, and at least two in the immediate area.

21. That property values are increasing in the area generally over time does not establish the impact of this Hotel on the adjoining and adjacent tracts, nor whether the value of those particular tracts would suffer an adverse impact if the Hotel is constructed.

22. There was no data or comparable sales to substantiate Mr. Crozier's claim that the Hotel Indigo was in part, the reason for the recent increase in property values in this area of downtown Asheville, or to show such increases were higher or lower than in other parts of the City during the same time period.

23. There was no evidence or data that could show the impact on the value of adjacent properties, when the proposed Hotel would be the third hotel in a several block radius. It appears that additional hotels could increase the value of other nearby hotels, but no facts or data were provided that could establish that property with other uses would not be substantially diminished.

24. The Expert Report also contains the following statements, which brings the reliability of the Expert Report into question:

> a. "The information contained in the Report or upon which the Report is based has been gathered from sources the Appraiser assumes to be reliable and accurate. The owner of the Property may have provided some of such information. Neither the Appraiser nor C&W [Cushman & Wakefield] shall be responsible for the accuracy or completeness of such information, including the correctness of estimates, opinions, dimensions, sketches, exhibits and factual matters. . . . . [sic]"
>
> b. "This report assumes that the subject will secure an affiliation with Embassy Suites or a similar chain. If the subject does not maintain a

> similar affiliation, it could have a negative impact on the subject's market value."
>
> c. "Our financial analyses are based on estimates and assumptions which were developed in connection with this appraisal engagement. It is, however, inevitable that some assumptions will not materialize and that unanticipated events may occur which will cause actual achieved operating results to differ from the financial analyses contained in the report, and these difference[s] may be material. It should be further noted that we are not responsible for the effectiveness of future management and marketing efforts upon which the projected results contained in this report may depend."

25. The CUP application does not request that the Hotel be only an Embassy Suites hotel or a "similar chain."

26. The methodologies employed, and data provided, by the Applicant's witness, Mr. Crozier, were inadequate to allow Council to find that the Hotel would not substantially injure the value of adjoining properties.

27. There is significant traffic in downtown Asheville near and around the Property in September and October, and in the summer months. The vehicular traffic in the area will increase if the Hotel is constructed.

28. The Applicant presented the testimony of a traffic engineer, Kevin Dean, as well as Mr. Dean's written "Traffic Assessment." The Traffic Assessment did not provide any facts or data which could show the level of traffic or traffic counts for any time of the year, except during a four hour period during the day on November 10, 2016, which was a Thursday. The level of traffic in this area is much higher at other times of the year, particularly the summer months; however, there were no traffic counts or any traffic data provided for any date other than November 10.

29. Mr. Dean was not aware of the environmental conditions on November 10, 2016, or whether such conditions could have affected traffic volumes on that date.

30. The Applicant's traffic counts were done on November 10, 2016 between the hours of 7 a.m. and 9 a.m., and between the hours of 4 p.m. and 6 p.m. Under industry standards, this is apparently "assumed" to be the time of highest traffic on nearby streets, but there was no evidence which could establish this would be the case for this area of Asheville.

31. The number of trips generated from the Hotel in the Traffic Assessment was also derived from an industry standard, and not the actual trips expected from this Hotel at this location. Hotels in downtown Asheville have an occupancy rate in excess of 85%, but the general rate for an efficient market is 65%. The Traffic Assessment did not take this expected higher occupancy of the Asheville market into account.

32. The Applicant did not submit any traffic data for Friday through Sunday, even though those are typically the days that tourists visit the City and traffic volumes are higher.

33. The estimated traffic counts used for the Traffic Assessment and Mr. Dean's opinion, were also these on a "typical weekday." There was no weekend data collected, even though this is the time that most tourists visit the Asheville downtown.

34. Without accurate traffic counts for any days other than Thursday November 10, there is no data or evidence to determine whether the additional trips generated by the Hotel (as well [as] those from the other tourists which the Hotel will attract but who do not stay at the hotel) would not decrease the existing level of service to an unacceptable level. The Level of Service Summary in the Traffic Assessment was not based on complete information or data.

35. There was no data or evidence presented that could show what the level of traffic would be with three hotels (Indigo, Hyatt and Embassy Suites) located within a several block area for Friday, Saturday and Sunday during the summer months or other high traffic periods.

36. The Traffic Assessment did not account for traffic that will be generated by future hotels and apartments in

> the downtown area that are planned and approved, but which are not yet fully constructed and operational.
>
> 37. The proposed Hotel includes a twenty-foot wide driveway, which provides street access to and from the parking structure and North French Broad Avenue.
>
> 38. There is a blind hill with limited visibility in the vicinity of the Hotel's parking deck[ ] entrance and exit onto North French Broad Avenue. To determine whether the addition of that entrance/exit would cause a safety issue would require a "sight distance check." A sight distance check was not a part of the Traffic Assessment and no other evidence was presented to show the parking deck entrance or exit would not endanger driver or pedestrian safety. The Traffic Assessment did no analysis relating to traffic safety as it relates to vehicles entering and exiting this driveway.

Based upon these findings of fact, the City Council concluded that PHG had failed to produce competent, material, and substantial evidence that the hotel (1) "will not materially endanger the public health or safety;" (2) "is reasonably compatible with significant natural and topographic features of the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant;" (3) "will not substantially injure the value of the adjoining or abutting property;" (4) "will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located and, moreover, the evidence instead showed the Hotel would not be in harmony with the scale, bulk, coverage and character of the area and neighborhood;" (5) "will generally conform to the comprehensive plan, smart growth policies, sustainable economic development strategic plan and other official plans adopted by the City and, moreover, the evidence instead showed the Hotel would not generally conform to the City's 2036 Vision Plan;" and (6) "will not cause undue traffic congestion or create a traffic hazard."

On 16 March 2017, PHG filed a petition seeking the issuance of a writ of certiorari pursuant to N.C.G.S. § 160A-393 authorizing judicial review of the City Council's decision to deny its permit application in which PHG alleged that the City Council had (1) "erred as a matter of law by not accepting PHG's evidence as competent, material, and substantial evidence entitling PHG to a permit;" (2) made findings of fact not supported by substantial evidence; and (3) made findings of fact that

were arbitrary and capricious.[1] On the same day, the requested writ of certiorari was issued. The issues raised by PHG's petition were heard before the trial court at the 2 October 2017 civil session of Superior Court, Buncombe County. On 2 November 2017, the trial court entered an order determining that PHG was entitled to the issuance of the requested conditional use permit and ordered that this matter be "remanded to the City of Asheville City Council with the directive that it grant PHG's application and issue it a Conditional Use Permit at its next regularly scheduled meeting."

In support of this decision, the trial court concluded that, contrary to the City Council's decision, the evidence submitted in support of PHG's request for the issuance of a conditional use permit "was competent, material and substantial and sufficient to establish a *prima facie* case of entitlement to a conditional use permit" and that, "[i]n deciding otherwise, the Council [had] made an error of law." In addition, the trial court concluded that "the [C]ity's decision was not supported by substantial evidence appearing in the record" and was, instead, "arbitrary and capricious." The trial court further determined that the testimony of Mr. Rawls concerning traffic safety-related issues was "incompetent as a matter of law" and that the City Council had failed to recognize that "PHG had only a burden of production, and not a burden of persuasion" at the first stage of this proceeding. The City noted an appeal to the Court of Appeals from the trial court's order.

In seeking relief from the trial court's order before the Court of Appeals, the City argued that the trial court had applied an incorrect standard of review when it "expressly and erroneously applied *de novo* review in evaluating whether the evidence was 'sufficient.' " In addition, the City contended that the trial court had erred by concluding that PHG had met its burden of eliciting competent, material, and substantial evidence tending to show that the hotel would not substantially injure the value of adjoining or abutting properties; cause undue traffic congestion or a traffic hazard; or be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which the proposed hotel was intended to be located.[2] Finally, the City contended that the

1. PHG also alleged that the City Council had violated its due process rights by prejudging the permit request. However, the trial court did not agree, and this issue was not appealed.

2. The City failed to argue before the Court of Appeals that the trial court had erred by concluding that PHG had satisfied its burden of producing competent, material, and substantial evidence addressing the three ordinance criteria that are not discussed in the text of this opinion, thereby abandoning its right to challenge the trial court's decision

trial court had erred by considering the recommendations that had been made by various City committees and advisory boards and by holding that the City Council's decision was arbitrary and capricious.

In rejecting the City's challenge to the trial court's order, the Court of Appeals began by concluding that the trial court had correctly applied the appropriate standard of review. *PHG Asheville, LLC v. City of Asheville*, 822 S.E.2d 79, 86 (N.C. Ct. App. 2018) (stating that "[t]he superior court's order shows it did not weigh evidence, but properly applied *de novo* review to determine the initial legal issue of whether Petitioner had presented competent, material, and substantial evidence"). According to the Court of Appeals, "[t]he City Council's 44 findings of fact were unnecessary, improper, and irrelevant" because "[n]o competent, material, and substantial evidence was presented to rebut Petitioner's *prima facie* case, and no conflicts in the evidence required the City Council to make findings to resolve any disputed issues of fact." *Id.* The Court of Appeals reached this conclusion based upon N.C.G.S. § 160A-393(l)(2), which provides that "findings of fact are not necessary when the record sufficiently reveals the basis for the decision below or *when the material facts are undisputed and the case presents only an issue of law*." *Id.* (cleaned up) (quoting N.C.G.S. § 160A-393(l)(2) (2017)). For that reason, the Court of Appeals held that any "whole record" review that the trial court might have conducted had been rendered unnecessary in light of its determination that PHG had presented competent, material, and substantial evidence that sufficed to establish the existence of a *prima facie* case of entitlement to the issuance of the permit and that no competent, material, and substantial evidence had been presented in opposition to PHG's request. *Id.* at 87. More specifically, the Court of Appeals held that Mr. Crozier's report and related testimony "constitute[d] material, as well as competent and substantial, evidence to show *prima facie* compliance with criteria 3," *id.* at 90, and that "[n]o competent, material, and substantial expert evidence contra was presented at the hearing to show [that] Crozier's analysis was unsound or utilized an improper methodology." *Id.* at 89 (stating that "[t]he City Council's lay notion that Crozier's analysis is based upon an inadequate methodology does not constitute competent evidence under the statute to rebut his expert testimony and report"). Similarly, the Court of Appeals concluded that "[n]o competent, material, and substantial evidence was presented to refute Dean's traffic analysis," that Mr. "Dean [had] testified [that] his

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with respect to those criteria on appeal. *See* N.C.R. App. P. 28(a) (stating that "[i]ssues not presented and discussed in a party's brief are deemed abandoned").

study was conducted in accordance with industry standards and used standard industry data and methods," and that "[t]he speculations of lay members of the public and unsubstantiated opinions of City Council members do not constitute competent evidence contra under the statutes and precedents to rebut Dean's traffic analysis." *Id.* at 91. As a result, for all of these reasons, the Court of Appeals affirmed the trial court's order. On 9 May 2019, this Court allowed the City's discretionary review petition.

In seeking to persuade us to overturn the Court of Appeals' decision, the City argues that, pursuant to this Court's holding in *Mann Media*, "a local government may deny a conditional use permit if, at the permit hearing, the developer is unable to definitively address whether the proposed development presents a safety risk" and "that this rule applies even when the safety risk is raised by members of the public whose testimony is ultimately inadmissible," citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 16–17, 565 S.E.2d 9, 19 (2002). In the City's view, "there is no meaningful difference between *Mann Media* and this case" given that, in *Mann Media*, members of the public raised concerns about ice falling from a tower while, in this case, a member of the public raised a safety issue concerning the presence of a blind hill near a parking garage. The City argues, that, just like in *Mann Media*, "PHG's witness could not state with certainty—much less 'satisfactorily . . . prove' or '*guarantee*'—that the proposed development would not create a 'safety risk' " and that PHG's failure to adequately address this safety issue necessitated denial of PHG's permit, quoting *Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19. In addition, the City argues that, "when the local government assesses the evidence at the permit hearing, the local government may rely on its knowledge of the local community," citing *Humble Oil & Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974). The City contends that, "instead of allowing local knowledge to inform local permitting decisions, the Court of Appeals expressly constrained local governments from considering that local knowledge." As a result, the City contends that the Court of Appeals' decision conflicts with our decisions in *Mann Media* and *Humble Oil* and that, "[i]f left undisturbed[, it] would usher in a new era of perfunctory, rubber-stamp review" of conditional use permits by local governing bodies.

Secondly, the City argues that "the Court of Appeals erred in its treatment of the City Council's factual findings." In the City's view, the City Council's findings of fact concerning traffic congestion and

traffic hazards and its findings of fact concerning the effect of the proposed hotel upon the value of surrounding properties had ample record support.[3]

In seeking to convince us to affirm the Court of Appeals' decision, PHG argues that "an applicant is entitled to a conditional use permit if the applicant meets its prima facie burden" of producing competent, material, and substantial evidence in support of each condition set out in the applicable land use ordinance. According to PHG, "the applicant only has a burden of production" rather than a burden of persuasion, with this burden of production having been "deliberately and appropriately [set at a] low [level] in conditional use permit cases because [the City] has already legislatively determined that the proposed use is an acceptable use at the location, subject to meeting the standards of a [conditional use permit]." For that reason, PHG contends that the issue of whether an applicant has met its initial burden to produce competent, material, and substantial evidence is a legal question subject to *de novo* review and that a reviewing court "is not bound by a municipality's factual findings" in making that decision. As a result, PHG asserts that "the City Council erred in denying the conditional use permit" because it met its burden of production regarding both traffic and property values and because "[t]he City Council's findings were not based on competent, material, and substantial evidence."

As this Court said just over forty years ago, "[t]he granting of a special exception is apparently not too generally understood." *Woodhouse v. Bd. of Comm'rs*, 299 N.C. 211, 218, 261 S.E.2d 882, 887 (1980) (quoting *Syosset Holding Corp. v. Schlimm*, 159 N.Y.S.2d 88, 89 (N.Y. Sup. Ct. 1956), *modified and aff'd*, 164 N.Y.S.2d 890 (N.Y. App. Div. 1957)). "A conditional use permit 'is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.' " *Id.* at 215–16, 261 S.E.2d at 886 (quoting *Humble Oil*, 284 N.C. at 467, 202 S.E.2d at 135).

By the time that a case arising from an application for the issuance of a conditional use permit reaches this Court, the proceeding in

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3. The City has abandoned the contention that it advanced before the Court of Appeals that the trial court had erred by reversing the City Council's determination that PHG failed to meet its burden of producing competent, material, and substantial evidence that the development of the hotel would be in harmony with the scale, bulk, coverage, density and character of the area or neighborhood in which it is located by failing to bring that contention forward for our consideration in its new brief before this Court. *See* N.C.R. App. P. 28(a)

question has been subject to several levels of examination and review. As an initial matter, the application must be considered by the applicable local governmental body. *See* N.C.G.S. § 160A-388(a), (c) (2019). In the event that the local governmental body denies the application, the applicant has the right to seek judicial review of that decision by the superior court. *See id.* §§ 160A-388(e2)(2), -393. At the conclusion of that process, a disappointed litigant is entitled to seek appellate review of the trial court's decision in accordance with the relevant statutory provisions and the North Carolina Rules of Appellate Procedure.

At each step in this multi-level process, a distinct legal standard is applicable. According to well-established North Carolina law, the local governing board "must follow a two-step decision-making process in granting or denying an application for a [conditional] use permit." *Mann Media*, 356 N.C. at 12, 565 S.E.2d at 16. As an initial matter, the local governmental body must determine whether "an applicant has produced competent, material, and substantial evidence *tending to establish* the existence of the facts and conditions which the ordinance requires for the issuance of a [conditional] use permit." *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136 (emphasis added). In the event that the applicant satisfies this initial burden of production, then "*prima facie* he is entitled to" the issuance of the requested permit. *Id.* At that point, any decision to deny the application "should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record," *id.*, with the local governmental body lacking the authority to "deny a permit on grounds not expressly stated in the ordinance" given that "it must employ specific statutory criteria which are relevant." *Woodhouse*, 299 N.C. at 218–19, 261 S.E.2d at 887.

The superior court " 'sits in the posture of an appellate court' and 'does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board.' " *Mann Media*, 356 N.C. at 12–13, 565 S.E.2d at 17 (quoting *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 626–27, 265 S.E.2d 379, 383 (1980)). In reviewing the local governmental body's decision, the superior court is charged with:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

> (4) Insuring that decisions of town boards are supported by competent, material[,] and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Id. at 13, 565 S.E.2d at 17 (quoting *Coastal Ready-Mix*, 299 N.C. at 626, 265 S.E.2d at 383); *see also* N.C.G.S. § 160A-393(k)(1)(b) (2019) (providing that the superior court should insure that the local governmental body's decision concerning a conditional use permit was not "[i]n excess of the statutory authority conferred upon the city, including preemption, or the authority conferred upon the decision-making board by ordinance").

The exact nature of the standard of review to be utilized by the superior court in any particular case "depends upon the particular issues presented on appeal." *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17 (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)). In the event that the petitioner asserts that the local governmental body has committed an error of law, then that contention is subject to *de novo* review. *Id.* Under the well-established *de novo* standard of review, "the superior court 'considers the matter anew and freely substitutes its own judgment for the [local governing board's] judgment.' " *Mann Media*, 356 N.C. at 13–14, 565 S.E.2d at 17 (cleaned up) (quoting *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)). The extent to which "the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo." N.C.G.S. § 160A-393(k)(2) (2019).[4] In the event that the petitioner contends that the local governmental body's decision was either (1) arbitrary or capricious or (2) not supported by competent, material, or substantial evidence, the superior court is required to conduct a whole

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4. PHG filed a motion seeking to have the City's appeal dismissed on the grounds that it had been rendered moot as a result of the enactment of Session Law 2019-111 on 28 June 2019, which added the language quoted in the text to N.C.G.S. § 160A-393(k)(2). *See* An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111, § 1.9, https://perma.cc/G86W-WPR6. In PHG's view, the enactment of this legislation "definitively answered the principal question presented in this appeal: what is the appropriate standard of review for whether an applicant has met its prima facie burden of producing competent, material, and substantial evidence?" We are not persuaded by this argument. As an initial matter, S.L. 2019-111 states that it "clarif[ies] and restate[s] the intent of existing law and appl[ies] to ordinances adopted before, on, and after the effective date." *Id.* at § 3.1. In addition, the content of the applicable standard of review is not determinative in this instance. As a result, we deny PHG's motion to dismiss the City's appeal.

record review. *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17. In conducting a whole record review, the reviewing court "must 'examine all competent evidence' (the 'whole record') in order to determine whether the [local governing body's] decision is supported by 'substantial evidence.' " *Id.* at 14, 565 S.E.2d at 17 (quoting *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392). Under the whole record test, the reviewing court is not allowed "to replace the board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Id.* at 14, 565 S.E.2d at 17–18 (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). Any order that the superior court enters in the course of reviewing a local governmental board's decision relating to the issuance of a conditional use permit "must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Id.* at 13, 565 S.E.2d at 17 (citation omitted).

In the event that appellate review of the superior court's order is requested, the appellate court "examines the trial court's order for error[s] of law," with that "process ha[ving] been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* at 14, 565 S.E.2d at 18 (quoting *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392). In the event that the case under consideration reaches this Court after a decision by the Court of Appeals, the issue before this Court is whether the Court of Appeals committed any errors of law. N.C.R. App. P. 16(a). For that reason, this Court is required to make the same inquiry that the Court of Appeals was called upon to undertake in reviewing the trial court's order. As a result, we will now examine whether the trial court utilized the appropriate standard of review and, if so, whether it did so properly.

[1] As the record that is before us in this case clearly reflects, the trial court appropriately engaged in both *de novo* and whole record review. *Mann Media*, 356 N.C. at 15, 565 S.E.2d at 18 (stating that a "court may properly employ both standards of review in a specific case" as long as "the standards are to be applied separately to discrete issues" and the trial court "identif[ies] which standard(s) it applied to which issues" (citations omitted)). In addressing the issue of whether PHG adduced sufficient evidence to satisfy the applicable burden of production, the trial court stated that:

> Exercising de novo review, the Court concludes as a matter of law that the evidence presented by PHG and other

> supporting witnesses was competent, material and substantial and sufficient to establish a *prima facie* case of entitlement to a conditional use permit. In deciding otherwise, the Council made an error of law. A court reviews "de novo the initial issue of whether the evidence presented by a petitioner met the requirement of being competent, material, and substantial." *Blair Investments, LLC. v. Roanoke Rapids City Council*, 231 N.C. App. 318, 321, 752 S.E.2d 524, 527 (2013).

Thus, the trial court engaged in *de novo* review in analyzing PHG's challenge to the City Council's determination that PHG had failed to make the necessary *prima facie* showing of entitlement to the issuance of the requested conditional use permit.

As this Court has clearly held, the extent to which an applicant has presented competent, material, and substantial evidence tending to satisfy the standards set out in the applicable ordinance for the issuance of a conditional use permit is a question directed toward the sufficiency of the evidence presented by the applicant and involves the making of a legal, rather than a factual, determination. *See Styers v. Phillips*, 277 N.C. 460, 464, 178 S.E.2d 583, 586 (1971) (stating that "[w]hether there is enough evidence to support a material issue is always a question of law for the court"). For that reason, we have previously analogized an applicant's burden of producing competent, material, and substantial evidence to support the issuance of a conditional use permit to the making of the showing necessary to overcome a directed verdict motion during a jury trial. *Humble Oil*, 284 N.C. at 470–71, 202 S.E.2d at 137 (stating that "[s]ubstantial evidence is more than a mere scintilla" and "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury" (citation omitted)).

In concluding that PHG presented sufficient evidence to support the issuance of the requested conditional use permit, the trial court recognized that "PHG submitted a large volume of evidence that its hotel project met all ordinance standards" and that the evidence that PHG elicited "included [testimony from] five witnesses [three of whom] were received as experts, without objection, and who presented live testimony and ample reports, also received without objection." In addition, the trial court noted that "no competent evidence opposing the . . . application appear[ed] in the record." The Court of Appeals held that "[t]he superior court's order shows it did not weigh evidence, but properly applied *de novo* review to determine the initial legal issue of

whether Petitioner had presented competent, material, and substantial evidence." *PHG Asheville*, 822 S.E.2d at 86. We agree with the Court of Appeals that the trial court utilized the appropriate standard of review with respect to this issue and did so properly.[5]

[2] As the record reflects, PHG presented the testimony of two architects, an appraiser, a traffic engineer, a certified planner, and the Vice President of PHG who, between them, presented evidence concerning each of the standards enunciated in the relevant portion of the City's land use ordinance. Mr. Crozier and Mr. Dean, whose testimony is at issue in the case as it has been presented to us, were each qualified as experts in their respective fields. Both Mr. Crozier and Mr. Dean submitted voluminous reports that contained extensive data detailing the basis for their conclusions. Mr. Crozier's appraisal report and testimony provided ample support for PHG's contention that the proposed hotel would not substantially injure the value of adjoining or abutting properties by

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5. This Court did hold in *Mann Media* that, "[u]nder the whole record test, in light of petitioners' inability satisfactorily to prove that the proposed use would not materially endanger public safety, we are not permitted to substitute our judgment for that of [the governing board]" and "hold that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case." *Mann Medi*a, 356 N.C. at 17, 565 S.E.2d at 19. The Court engaged in whole record review in *Mann Media* because the wording of the superior court's order "suggest[ed] that the superior court applied both [*de novo* and whole record review] simultaneously in several instances," a fact that left us "unable to conclude that the superior court consistently exercised the appropriate scope of review." *Id.* at 15, 565 S.E.2d at 18. Even so, we concluded that no remand was necessary "because the central issue presented by [the governing board] and argued by both parties on appeal is whether there was competent, material, and substantial evidence to support [the governing board's] denial of a [conditional] use permit," with "[r]esolution of this issue involv[ing] evaluation of evidence used by [the governing board] to deny the application" and with "the entire record of the hearing [being] before us." *Id.* As a result, the Court applied the whole record test in *Mann Media* "in the interests of judicial economy," *id.* at 16, 565 S.E.2d at 19, rather than because it was fundamentally altering the existing process for judicially reviewing challenges to the denial of conditional use permits and implicitly overruling decisions discussed in the text and cited without exception in *Mann Media* for the purposes for which we have cited them in this opinion, such as *Humble Oil*. *Id.* at 12, 565 S.E.2d at 16. In view of the fact that the trial court appropriately separated the issue of whether PHG had established the required *prima facie* case from the other issues that were before it at that time, there was no need for either the Court of Appeals or this Court to refrain from utilizing the ordinarily applicable standard of review, which *Mann Media* did nothing to change. In addition, the City has not cited any statutory provision or decision of this Court that in any way suggests that the manner in which its conditional use permit ordinance is couched has any effect upon the manner in which a decision refusing to issue a conditional use permit should be reviewed by either the trial or appellate courts. As a result, the issue of whether the applicant for a conditional use permit made out the necessary *prima facie* case does not involve determining whether the applicant met a burden of persuasion, as compared to a burden of production, and is subject to *de novo*, rather than whole record, review during the judicial review process.

detailing recent land sales in the area near the proposed hotel development and applying the principle of progression before concluding that the construction and operation of the proposed hotel would not injure the value of adjoining or abutting properties and would, instead, cause their values to increase. Similarly, Mr. Dean's traffic study and testimony provided ample support for PHG's contention that the proposed hotel would not cause undue traffic congestion or create a traffic hazard in light of the City staff's statement that "all we needed to provide was the trip generation table . . . as well as our anticipated distribution of those trips." Mr. Dean's analysis, which was performed in accordance with industry standards and utilized rates and equations developed by the Institute of Traffic Engineers, concluded that the traffic caused by the proposed development would result in only a "minimal impact" and would "only increase the overall delay at [nearby] intersections by about four seconds." We agree with the trial court and the Court of Appeals that the evidence that PHG presented before the City Council sufficed to satisfy its burden of producing competent, material, and substantial evidence tending to show that it satisfied the relevant ordinance standards.

[3] In light of the fact that PHG had made a sufficient showing to survive what amounted to a directed verdict motion and the City does not contend that the record contains any "evidence contra," the City Council's inquiry should have ended at this point. *See* N.C.G.S. § 160A-388(e2)(1) (2019) (stating that "[t]he board shall determine contested facts and make its decision within a reasonable time" by entering an order that "reflect[s] the board's determination of contested facts and their application to the applicable standards"); *see also id.* § 160A-393(l)(2) (stating that "findings of fact are not necessary when the record sufficiently reveals the basis for the decision below or when the material facts are undisputed and the case presents only an issue of law"). Instead, however, the City Council concluded that PHG had failed to make the necessary *prima facie* showing and attempted to support this determination with a series of findings of fact that rested upon incompetent testimony and questioned the credibility of the testimony provided by PHG's witnesses.

In defense of the approach that it took in considering PHG's application, the City argues that the Court of Appeals disregarded the findings of fact that are contained in its order and argues that the effect of the Court of Appeals' decision was that, "if no one shows up to oppose a project and introduce evidence in opposition, every new development would be a fait accompli." However, the basis upon which the City seeks

to have its decision upheld rests upon a misapprehension of the applicable law, under which "[a] denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136. In other words, given that PHG elicited sufficient evidence to satisfy its burden of production to show an entitlement to the issuance of the requested conditional use permit, the City Council did, in fact, lack the authority to deny PHG's application in the absence of competent, material, and substantial evidence tending to support a different outcome.

The findings of fact contained in the City's order are simply inadequate to support the result that the City Council ultimately reached. As an initial matter, we note that the City Council's findings concerning property values and traffic-related issues lack any support in the admissible and competent evidence. Simply put, given the absence of any evidence that tended to conflict with Mr. Crozier's appraisal study, there were no factual issues relating to the property value issue which the City Council needed to resolve. Instead, the City Council's findings of fact fault Mr. Crozier for failing to include information that he had no reason, based upon an examination of the relevant ordinance language, to conclude would be needed or even relevant. For example, the City Council states in Finding of Fact No. 19 that "[t]here was no evidence, through facts and data, to indicate how the Hotel would affect or impact such an increase in value" despite the fact that the City's unified development ordinance merely required PHG to produce evidence tending to establish that the proposed development would not substantially injure the value of adjoining or abutting properties without making any mention of a requirement that the applicant establish the amount by which the proposed development would affect the value of surrounding properties. Similarly, in Finding of Fact No. 20, the City Council faulted Mr. Crozier for failing to present comparable sales data relating to properties in other parts of Asheville or in entirely different cities. The fundamental problem with the City Council's justifications for refusing to credit the testimony of Mr. Crozier is that it held PHG to a burden that is simply not reflected in or supported by the relevant ordinance provisions. *See Woodhouse*, 299 N.C. at 219, 261 S.E.2d at 887–88 (stating that "[t]o hold that an applicant must first anticipate and then prove or disprove each and every general consideration would impose an intolerable, if not impossible, burden on an applicant for a conditional use permit," with an applicant not being required to "negate every possible objection to the proposed use").

The same deficiencies are present in the City Council's findings concerning traffic-related issues. Once again, no competent, material, or substantial evidence was presented in opposition to the conclusions drawn in Mr. Dean's analysis. In spite of the fact that Mr. Dean's uncontested testimony established that his traffic study had been performed in accordance with industry standards, the City Council questioned the credibility of the results reached in his study on the grounds that he had failed to base his study upon conditions specific to Asheville. Among other things, the City Council criticized Mr. Dean for failing to base his traffic study upon data relating to conditions on the weekend or during the summer or fall seasons when tourist-related traffic in Asheville is at its height. Once again, the City Council's findings reflect an insistence upon the presentation of evidence that is never mentioned in the City's land use ordinance, which is a standard to which the applicant cannot lawfully be held. In addition, the City Council's findings also rested upon the testimony of Mr. Rawls, who raised questions about limitations upon the ability of persons exiting the hotel's parking garage to see up and down an adjoining street in spite of the fact that the General Assembly had determined that lay testimony concerning traffic conditions is not competent in conditional use permit proceedings. *See* N.C.G.S. § 160A-393(k)(3)(b) (2019) (stating that "[t]he term 'competent evidence,' as used in this subsection, shall, regardless of the lack of a timely objection, not be deemed to include the opinion testimony of lay witnesses as to . . . [t]he increase in vehicular traffic resulting from a proposed development [which] would pose a danger to the public safety"). As a result, the City Council's traffic-related findings do not justify a decision to reject Mr. Dean's analysis of the impact of the proposed hotel on traffic in the surrounding area.

A city council is, of course, entitled to rely upon the special knowledge of its members concerning conditions in the locality which they serve. However, this principle does not justify the City Council's decision to deny PHG's permit application in this case. In *Humble Oil*, a town alderman opposed the issuance of a conditional use permit for a filling station in Chapel Hill, stating that the intersection near the proposed station "had been dangerous for twenty-eight years." *Humble Oil*, 284 N.C. at 469, 202 S.E.2d at 136. Before holding that this statement and others like it were nothing more than "conclusions unsupported by factual data or background" so as to be "incompetent and insufficient to support the Aldermen's findings," *id.*, we stated that

> [i]f there be facts within the special knowledge of the members of a Board of Aldermen or acquired by their personal

> inspection of the premises, they are properly considered. However, they must be revealed at the public hearing and made a part of the record so that the applicant will have an opportunity to meet them by evidence or argument and the reviewing court may judge their competency and materiality.

Id. at 468, 202 S.E.2d at 136.

As we have already noted, several members of the City Council mentioned facts within their special knowledge about the city that they represented during the quasi-judicial hearing held for the purpose of considering PHG's application. Among other things, various members of the City Council questioned Mr. Dean concerning the manner in which he conducted his traffic study, with their questions raising issues about the extent to which his study should have been based upon conditions existing at a different date and time. Aside from the fact that Mr. Dean was able to answer and provide reasonable explanations for his answers, nothing in the relevant ordinance provision required Mr. Dean to have anticipated these questions and to have conducted his study in the manner that these questions seemed to believe to have been appropriate without sufficient advance notice to have permitted him to present any necessary rebuttal evidence. As a result, nothing in the special facts known to the members of the City Council in this case justified the making of a decision that PHG had failed to satisfy its burden of production or to reject PHG's permit application.

[4] Finally, the City argues that this Court's decision in *Mann Media* requires a decision in its favor. In *Mann Media*, the Randolph County Planning Board denied an application for the issuance of a conditional use permit authorizing the construction and operation of a broadcast tower based upon concerns that ice would fall from the necessary support beams. *Mann Media*, 356 N.C. at 3–5, 565 S.E.2d at 11–12. After determining that the evidence presented in opposition to the issuance of the proposed permit constituted incompetent "anecdotal hearsay," *id.* at 17, 565 S.E.2d at 19, this Court held that "petitioners [had] failed to carry their burden of proving that the potential of ice falling from support wires of the proposed tower was not a safety risk" in light of the fact that the applicant had "candidly acknowledged his inability to state with certainty that ice would not travel a greater distance in the event of wind or storm," *id.*, and that, for that reason, "petitioners [had] failed to meet their burden of proving this first requirement [that the proposed tower would not materially endanger public safety] and did not establish a *prima facie* case." *Id.* The same result would not be appropriate

in this case given that nothing in the relevant ordinance provision, particularly given the advice that Mr. Dean received from the City staff, set forth any requirement that the sort of sight distance study that the City Council wanted to have been conducted was required in order to obtain the issuance of the requested conditional use permit. If Department of Transportation regulations do require a sight distance survey, it is not the City Council's role to enforce those regulations in the guise of implementing the City's ordinances relating to conditional use permits.

Thus, we hold that the Asheville City Council made a legislative decision to allow certain uses by right in specified zones "upon proof that certain facts and conditions detailed in the ordinance exist." *Woodhouse*, 299 N.C. at 215–16, 261 S.E.2d at 886 (quoting *Humble Oil*, 284 N.C. at 467, 202 S.E.2d at 135). The effect of the making of this decision was to bind the Asheville City Council to the use of quasi-judicial procedures and to exclusive reliance upon the substantive standards enunciated in the relevant provisions of its land use ordinance in determining whether conditional use permit applications should be granted or denied. *See id.* at 219, 261 S.E.2d at 887 (stating that, "[w]here a zoning ordinance specifies standards to apply in determining whether to grant a [conditional] use permit and the applicant fully complies with the specified standards, a denial of the permit is arbitrary as a matter of law" (quoting *Hay v. Township of Grow*, 206 N.W.2d 19, 22 (Minn. 1973)). As a result, in the event that an applicant for the issuance of a conditional use permit presents competent, material, and substantial evidence tending to show that it has satisfied the applicable ordinance standards, it has made out a *prima facie* case of entitlement to the issuance of the conditional use permit, with any decision to deny the permit application being required to rest upon contrary findings of fact that have adequate evidentiary support. In view of the fact that PHG presented competent, material, and substantial evidence that its proposed hotel satisfied the relevant ordinance standards and the fact that no competent, material, and substantial evidence was presented in opposition to PHG's showing, the City simply lacked the legal authority to deny PHG's application. As a result, subject to the modified logic set forth in this opinion, we affirm the Court of Appeals' decision.

MODIFIED AND AFFIRMED.

Justice EARLS dissenting.

Here the majority overrules this Court's decision in *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, in which the Court held that the

question of whether a petitioner meets its burden of establishing a prima facie case for a conditional use permit is reviewed—not de novo—but rather under the whole record test, pursuant to which "we are not permitted to substitute our judgment for that of" the local government. 356 N.C. 1, 17, 565 S.E.2d 9, 19 (2002) ("Under the whole record test, in light of petitioners' inability satisfactorily to prove that the proposed use would not materially endanger public safety, we are not permitted to substitute our judgment for that of respondent. Accordingly, we hold that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case."). In my view, under the whole record test, the Asheville City Council's determination that PHG Asheville, LLC (PHG), failed to meet its burden of establishing that the proposed use would not cause undue traffic congestion or a traffic hazard was not arbitrary or capricious. I would therefore reverse the decision of the Court of Appeals, which affirmed the superior court's reversal of the City Council's denial of PHG's application. Accordingly, I respectfully dissent.

While "[z]oning ordinances list uses that are automatically permitted in a particular zoning district," which "are . . . referred to as 'uses by right,' " "[m]any zoning ordinances also allow additional uses in each district that are permitted only if specific standards are met; these are what are known as *special* and *conditional* uses." David. W. Owens, *Land Use Law in North Carolina*, at 159 (2d ed. 2011). As the majority notes, "[a] conditional use permit 'is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.' " *Woodhouse v. Bd. of Comm'rs of Nags Head*, 299 N.C. 211, 215–16, 261 S.E.2d 882, 886 (1980) (quoting *Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 467, 202 S.E. 2d 129, 135 (1974)). Notably, "[t]he standards underlying such permits include those that require application of some degree of judgment and discretion, as opposed to permitted uses where only objective standards are applied." Owens, *Land Use Law in North Carolina*, at 159.

When determining whether to grant a conditional use permit, the local government's authorized board[1] "operates as the finder of fact" and "must follow a two-step decision-making process" in making its determination:

> If "an applicant has produced competent, material, and substantial evidence tending to establish the existence

1. "North Carolina law allows the final decision on a special or conditional use permit to be assigned to the governing board, the board of adjustment, or the planning board." Owens, *Land Use Law in North Carolina*, at 160.

> of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it." If a prima facie case is established, "[a] denial of the permit [then] should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record."

Mann Media, 356 N.C. at 12, 565 S.E.2d at 17 (alterations in original) (quoting *Humble Oil & Ref. Co. v. Bd. of Aldermen of Chapel Hill*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974)). The "board sits in a quasi-judicial capacity" and

> must insure that an applicant is afforded a right to cross-examine witnesses, is given a right to present evidence, is provided a right to inspect documentary evidence presented against him and is afforded all the procedural steps set out in the pertinent ordinance or statute. Any decision of the town board has to be based on competent, material, and substantial evidence that is introduced at a public hearing.

Id. at 12, 565 S.E.2d at 16–17 (quoting *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Nags Head*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980)). The board "is 'without power to deny a permit on grounds not expressly stated in the ordinance' and it must employ specific statutory criteria which are relevant." *Id.* at 12, 565 S.E.2d at 16–17 (quoting *Woodhouse*, 299 N.C. at 218–19, 261 S.E.2d at 887); *see also* Owens, *Land Use Law in North Carolina*, at 160 n.8 ("While the standards for the permit involve application of a degree of discretion, the applicant is entitled to the permit upon establishing that the standards will be met.").

This Court addressed the standard of review applicable to the denial of a conditional or special use permit in *Mann Media*. There, the petitioners sought a special use permit to construct a broadcast tower in an area of Randolph County zoned for residential and agricultural use. *Mann Media*, 356 N.C. at 2, 565 S.E.2d at 11. Randolph County's zoning ordinance provided that a special use permit may be granted for public utilities, including broadcast towers, to be built in residential/agricultural areas, but required Randolph County's Planning Board (the Planning Board) to find four factors before granting the permit:

> (1) that the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved;
>
> (2) that the use meets all required conditions and specifications;

> (3) that the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and
>
> (4) that the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the Land Development Plan for Randolph County.

Id. at 11, 565 S.E.2d at 16. After hearing the petitioners' evidence, the Planning Board found, *inter alia*, that "ice has formed and fallen from the other towers within the county's zoning jurisdiction causing damage and is likely to do so from the proposed tower." *Id.* at 3, 565 S.E.2d at 12. The Planning Board denied the permit, determining that the proposed use would materially endanger the public safety, would substantially injure the value of adjoining or abutting property, and would not be in harmony with the surrounding area. *Id.* at 4, 565 S.E.2d at 12. On appeal, the superior court reversed, concluding that the Planning Board's decision was not supported by competent, material, and substantial evidence. *Id.* at 7–8, 565 S.E.2d at 14. In particular, the superior court determined that any evidence presented to the Planning Board concerning ice damage at other towers was incompetent, and therefore the Board's reliance on such evidence was arbitrary and capricious. *Id.* at 7–8, 565 S.E.2d at 14. A majority panel at the Court of Appeals affirmed the superior court, and the petitioners sought further review in this Court. *Id.* at 9, 565 S.E.2d at 15.

This Court stated that in appeals from denials of conditional use permits, the "superior court 'sits in the posture of an appellate court' and 'does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board.' " *Mann Media*, 356 N.C. at 12–13, 565 S.E.2d at 17 (quoting *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626–27, 265 S.E.2d at 383). The superior court's role consists of:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Id. at 13, 565 S.E.2d at 17 (quoting *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383). The Court explained that the applicable standard of "judicial review 'depends upon the particular issues presented on appeal.' " *Id.* at 13, 565 S.E.2d at 17 (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)). Specifically, "[w]hen the petitioner 'questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test.' " *Id.* at 13, 565 S.E.2d at 17 (quoting *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392). On the other hand, "[i]f a petitioner contends the [b]oard's decision was based on an error of law, 'de novo' review is proper." *Id.* at 13, 565 S.E.2d at 17 (quoting *Sun Suites Holdings, LLC v. Bd. of Aldermen of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527–28 (2000)). The Court stressed that "[t]hese standards of review are distinct," explaining:

> Under a *de novo* review, the superior court "consider[s] the matter anew[ ] and freely substitut[es] its own judgment for the agency's judgment." When utilizing the whole record test, however, the reviewing court must " 'examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by "substantial evidence." ' " "The 'whole record' test does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo."

Mann Media, 356 N.C. at 13–14, 565 S.E.2d at 17–18 (alterations in original) (citations omitted). The Court further elaborated that under the whole record test, a "finding must stand unless it is arbitrary and capricious," and that in making this determination

> the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law.
>
> The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as

> arbitrary or capricious if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate [ ]any course of reasoning and the exercise of judgment.[ ]"

Id. at 16, 565 S.E.2d at 19 (alterations in original) (citations omitted).

Applying these standards, the Court first examined the Planning Board's finding that the proposed broadcast tower would "materially endanger the public safety" due to the risk of ice falling from the tower. *Id.* at 16, 565 S.E.2d at 19. The Court stated:

> In this finding, respondent cited evidence of ice building up and falling from other towers. Our review of the record indicates that this evidence, consisting principally of ice brought before respondent in a cooler and anecdotal hearsay, was not competent. Even so, the record also indicates that petitioners failed to carry their burden of proving that the potential of ice falling from support wires of the proposed tower was not a safety risk. Petitioner Mann testified that while the tower itself would have deicing equipment, the support wires would not. Although he opined that any ice forming on the wires would slide down the wires, he candidly acknowledged his inability to state with certainty that ice would not travel a greater distance in the event of wind or storm. While Mann argued that the prevailing winds at the site are from a direction that would blow any ice away from nearby buildings and dwellings, he could not guarantee that falling ice would not be a risk. Other evidence in the record shows that numerous permanent structures lie in close proximity to the proposed tower site.
>
> Respondent's finding that petitioners failed to establish that there would be no danger to the public from falling ice is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment. The burden is on petitioners to meet the four requirements of the Ordinance before finding that a *prima facie* case has been established, and respondent did not state in its written order that petitioners made a *prima facie* case. Under the whole record test, in light of petitioners' inability satisfactorily to prove that the proposed use would not materially endanger public

> safety, we are not permitted to substitute our judgment for that of respondent. Accordingly, we hold that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case.

Id. at 17, 565 S.E.2d at 19. The Court ultimately[2] reversed the decision of the Court of Appeals and remanded for further remand with directions for the superior court to enter judgment affirming the Planning Board's denial of the special use permit. *Id.* at 19, 565 S.E.2d at 21.

Here, Asheville's ordinance provides that the "City Council *shall not* approve the conditional use application . . . *unless and until it makes the following findings*," including, *inter alia*, "[t]hat the proposed use will not cause undue traffic congestion or create a traffic hazard." (Emphases added.) Thus, as was the case in *Mann Media*, in order to establish a "*prima facie* case" for the conditional use permit under Asheville's ordinance, an applicant must not only meet a burden of production—evidence from which the fact-finder *could* make the requisite findings—but also a burden of persuasion—evidence from which the fact-finder *does* make the requisite findings.[3] *See Mann Media*, 356 N.C. at 17, 565

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2. Having concluded that the Planning Board's finding that the petitioners failed to establish a prima facie case with respect to the ordinance's first requirement was not arbitrary or capricious under the whole record test, the Court was "not obligated to address the remaining three requirements under the Ordinance." *Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19 (citing *Coastal Ready-Mix*, 299 N.C. at 632–33, 265 S.E.2d at 386). Nonetheless, "in the interests of completeness," the Court addressed the third requirement ("that the use will not substantially injure the value of adjoining or abutting property") and because the petitioners' expert failed to address "*adjoining or abutting* properties," the Court held that "under the whole record test, . . . petitioners failed to meet the Ordinance's third requirement." *Id.* at 18, 565 S.E.2d at 20. The Court also addressed the fourth requirement ("that the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the Land Development Plan for Randolph County") and determined that the superior court properly applied *de novo* review to this issue because it agreed with the Court of Appeals that, as a matter of law, "[t]he inclusion of a use as a conditional use in a particular zoning district establishes a prima facie case that the permitted use is in harmony with the general zoning plan." *Id.* at 19, 565 S.E.2d at 20 (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 142 N.C. App. 137, 139, 542 S.E.2d 253, 255 (2001)). Yet, because the Court determined that the petitioners failed to establish a *prima facie* case as to the first and third requirements of the ordinance, it was unnecessary to address whether sufficient evidence was presented to rebut the petitioners' *prima facie* showing with respect to the fourth requirement. *Id.* at 19, 565 S.E.2d at 20.

3. Admittedly, a "*prima facie* case" is typically synonymous with a burden of production. Nonetheless, regardless of terminology, it is clear under *Mann Media* that when an ordinance specifically requires the local board to in fact make necessary findings before a permit may permissibly be granted, the applicant must meet more than the burden of production before "*prima facie* he is entitled to" the permit. *Mann Media*, 356 N.C. at 12, 565 S.E.2d at 167.

S.E.2d at 19 (stating that where the ordinance required the Planning Board to find four factors before granting the permit, "[t]he burden is on petitioners to meet the four requirements of the Ordinance before finding that a *prima facie* case has been established, and respondent did not state in its written order that petitioners made a *prima facie* case," and "hold[ing] that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case."); Owens, *Land Use Law in North Carolina*, at 163 (stating that "the ordinance standards" at issue in *Mann Media* "required a finding that the use 'will not endanger the public health or safety" and that "[t]he [C]ourt upheld the permit denial based on a failure of the petitioner to meet the *burden of proof*[4] on this general standard" (emphasis added)); *see also*, *e.g.*, *Harding v. Bd. of Adjustment of Davie Cty.*, 170 N.C. App. 392, 394, 612 S.E.2d 431, 434 (2005) (holding that where Davie County's ordinance provided that a special use permit "shall not be granted unless" the Board of Adjustment made the requisite findings, the Board of Adjustment properly placed the burdens of production and persuasion on the applicant). Accordingly, the City Council properly noted in its order that "[t]he Applicant bears the burden of proving to the City Council, by competent, material and substantial evidence, that the proposed Hotel meets the seven CUP standards in the UDO."

Following the hearing, the City Council determined, *inter alia*, that PHG failed to prove that the proposed use "will not cause undue traffic congestion or create a traffic hazard," and made the following relevant findings:

> 8. The Property's primary frontage is along Haywood Street, which borders the Property's entire northern property line. The Property also has frontage along Carter Street, which borders the Property's entire western property line, and North French Broad Avenue, which is the only key pedestrian street which borders the Property. The Hotel is oriented towards Haywood Street.

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4. "The burden of proof includes both the burden of persuasion and the burden of production." Black's Law Dictionary 209 (11th ed. 2019); *see also*, *e.g.*, *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 729, 693 S.E.2d 640, 648 (2009) (Timmons-Goodson, J., dissenting) ("The burden of proof in any case includes both the burden of production and the burden of persuasion. The burden of production, also known in North Carolina as the 'duty of going forward,' is '[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling' such as a directed verdict or a judgment notwithstanding the verdict[.] The burden of persuasion, meanwhile, is the 'party's duty to convince the fact-finder to view the facts in a way that favors that party.' . . . The burden of persuasion is also often 'loosely termed [the] burden of proof.' " (citations omitted)).

. . . .

11. Ninety percent of the existing improvements in the area are one and two story structures and approximately 72 percent of those structures are less than 10,000 square feet. The Hotel would constitute the third hotel within a several block radius (approximately ¼ mile). The addition of this third hotel would change the visual character of the area, and would create a cluster of hotels in the immediate vicinity, where there were previously smaller buildings and more diverse uses.

. . . .

16. There is a significant amount of pedestrian traffic in the area near and around the Carter Street Driveway.

17. The Carter Street Driveway is 28 feet wide, which is wider than the 24 foot driveway width allowed by City Standards. The Applicant obtained a modification from the City's Transportation Department Director to allow for the wider driveway. The Transportation Department Director's written decision to allow the modification, however, does not address the impact of the wider driveway on the public health and safety and there was no evidence presented that would indicate the wider driveway would provide the same level of protection to the public, particularly pedestrians, as a driveway which would comply with City requirements.

. . . .

27. There is significant traffic in downtown Asheville near and around the Property in September and October, and in the summer months. The vehicular traffic in the area will increase if the Hotel is constructed.

28. The Applicant presented the testimony of a traffic engineer, Kevin Dean, as well as Mr. Dean's written "Traffic Assessment." The Traffic Assessment did not provide any facts or data which could show the level of traffic or traffic counts for any time of the year, except during a four hour period during the day on November 10, 2016, which was a Thursday. The level of traffic in this area is much higher at other times of the year, particularly the summer

months; however, there were no traffic counts or any traffic data provided for any date other than November 10.

29. Mr. Dean was not aware of the environmental conditions on November 10, 2016, or whether such conditions could have affected traffic volumes on that date.

30. The Applicant's traffic counts were done on November 10, 2016 between the hours of 7 a.m. and 9 a.m., and between the hours of 4 p.m. and 6 p.m. Under industry standards, this is apparently "assumed" to be the time of highest traffic on nearby streets, but there was no evidence which could establish this would be the case for this area of Asheville.

31. The number of trips generated from the Hotel in the Traffic Assessment was also derived from an industry standard, and not the actual trips expected from this Hotel at this location. Hotels in downtown Asheville have an occupancy rate in excess of 85%, but the general rate for an efficient market is 65%. The Traffic Assessment did not take this expected higher occupancy of the Asheville market into account.

32. The Applicant did not submit any traffic data for Friday through Sunday, even though those are typically the days that tourists visit the City and traffic volumes are higher.

33. The estimated traffic counts used for the Traffic Assessment and Mr. Dean's opinion, were also these on a "typical weekday." There was no weekend data collected, even though this is the time that most tourists visit the Asheville downtown.

34. Without accurate traffic counts for any days other than Thursday November 10, there is no data or evidence to determine whether the additional trips generated by the Hotel (as well those from the other tourists which the Hotel will attract but who do not stay at the hotel) would not decrease the existing level of service to an unacceptable level. The Level of Service Summary in the Traffic Assessment was not based on complete information or data.

35. There was no data or evidence presented that could show what the level of traffic would be with three hotels (Indigo, Hyatt and Embassy Suites) located within a several block area for Friday, Saturday and Sunday during the summer months or other high traffic periods.

36. The Traffic Assessment did not account for traffic that will be generated by future hotels and apartments in the downtown area that are planned and approved, but which are not yet fully constructed and operational.

37. The proposed Hotel includes a twenty-foot wide driveway, which provides street access to and from the parking structure and North French Broad Avenue.

38. There is a blind hill with limited visibility in the vicinity of the Hotel's parking deck's entrance and exit onto North French Broad Avenue. To determine whether the addition of that entrance/exit would cause a safety issue would require a "sight distance check." A sight distance check was not a part of the Traffic Assessment and no other evidence was presented to show the parking deck entrance or exit would not endanger driver or pedestrian safety. The Traffic Assessment did no analysis relating to traffic safety as it relates to vehicles entering and exiting this driveway.

39. The Hotel will have 5,000 square feet of meeting space, which would potentially attract visitors to the Hotel, other than guests staying at the Hotel. This meeting space use was not included in the Traffic Assessment nor included in the traffic analysis.

40. The Hotel would bring more than 50,000 new visitors to the City each year. Not all of these new visitors would be patrons of the Hotel, but would frequent downtown businesses and, therefore, add to the already dense downtown area. The Traffic Assessment did not account for any traffic caused by additional visitors, other than an estimate of trips by Hotel patrons and employees.

41. The Hotel parking deck would have 200 vehicular parking spaces. The Hotel contains 185 rooms and will have 75 employees. There are insufficient spaces in the proposed Hotel parking deck to accommodate this

> number of guests and employees, even if they all do not drive automobiles to the Hotel.
>
> 42. There is currently a shortage of public parking in downtown Asheville and there are often insufficient parking spaces to meet the demand. The development of the Hotel would exacerbate the parking shortages in the area, because of the limited number of parking spaces planned in the parking deck and the Applicant's failure to provide sufficient parking to accommodate all of its guests and employees.

As in *Mann Media*, we review the City Council's determination of whether PHG established a *prima facie* case and met its burden of proof under the ordinance under the whole record test, pursuant to which a finding "must stand unless it is arbitrary and capricious." *Mann Media*, 356 N.C. at 16, 565 S.E.2d at 19.

An examination of the record establishes that, at the hearing, PHG presented evidence noting that Asheville is not only "a tourist destination," but "is the hub of both commercial and tourist activity in Western North Carolina" and is "defined by its picturesque mountainous landscape." The report of PHG's real estate appraiser, Tommy Crozier, provided that the site of the proposed hotel "has an excellent location across from the Hotel Indigo and the new Hyatt Place hotel," and further that "[i]n the current market cycle, several large scale redevelopments downtown have been completed or are planned for near-term construction," including three recently opened hotels and six hotels currently in development among the "[n]otable projects." PHG acknowledged a concern with the proliferation of hotels in downtown Asheville, with its representatives stating that "[w]e know that there are questions about the overbuilding of hotels in downtown Asheville" and "[w]e do realize there's a lot of other hotels." PHG asserted that its proposed hotel is "a little bit different from some of the offerings at some of the other hotels" and addresses "an important niche in the hospitality of downtown Asheville" in that, in addition to its 185 rooms and its "detached, multilevel parking garage," it has "5000 square feet of meeting space, that will, hopefully, essentially will create its own demand." This meeting space would constitute "the second largest meeting space for hotels specifically in the downtown market area," according to PHG, and would "help [ ] to capture additional meetings and events that otherwise may move to Greenville or other cities." Crozier testified that "this hotel will generate somewhere north of 50,000 new visitors a year."

Additionally, PHG presented testimony from Kevin Dean, an engineer, who analyzed five intersections near the site of the proposed hotel and prepared a "traffic assessment" summarizing his findings. Dean's assessment "present[ed] trip generation, distribution, and traffic analyses of the existing and existing + site conditions" and states that "all of the study intersections are expected to continue to operate at acceptable levels of service with only minor increases in delay" and that "simulations show no queuing issues at any of the study intersections or on any of the I-240 ramps." At the hearing, Dean was asked about his decision to pick a Thursday in November to examine the potential for traffic congestion in downtown Asheville:

> COUNCILMAN BOTHWELL: My question, my first question is, why did you pick November 10th, a Thursday, to do your traffic study?
>
> MR. DEEN[5]: Traffic studies are -- traffic counts are only supposed to be counted between Tuesdays and Thursdays to get a typical weekday condition that's not affected by a Monday or Friday variation. So that's industry standard. We are required, typically, to only count on Tuesdays, Wednesdays, or Thursdays.
>
> . . . .
>
> COUNCILMAN BOTHWELL: I am wondering about the choice of November, too. I mean, we have, say, September and October, we have a lot of tourist traffic here. Summertime it's jammed all the time.
>
> MR. DEEN: Sure.
>
> COUNCILMAN BOTHWELL: And your report says there's no expectation of [queuing].
>
> MR. DEEN: Sure.
>
> COUNCILMAN BOTHWELL: But there is also [queuing] at where you turn off of Montford and then go to North French Broad, it sometimes backs up all the way across the bridge.
>
> MR. DEEN: Okay.

5. The transcript of the hearing misspells Mr. Dean's name as "Deen."

COUNCILMAN BOTHWELL: And, again, with traffic coming from the eastbound exit with -- when you get to that light and turn left into the hotel. --

MR. DEEN: Okay.

COUNCILMAN BOTHWELL: -- to the new entrance --

MR. DEEN: Sure.

COUNCILMAN BOTHWELL: -- won't that cause [queuing] on Haywood Street waiting to turn into the left?

MR. DEEN: So I can't argue with your anecdotal stories. What I can tell you is the amount of traffic that's going to be added is only supposed to be negligible increase to any cues that you would see. I mean, five seconds -- five percent of the intersection or less. I think it's closer to three percent at that intersection, which is very mild.

COUNCILMAN BOTHWELL: Okay

MR. DEEN: So I would just go to say that it's not going to cause any undue additional issues.

When asked whether his assessment took into account the current development in that area, including the "other hotels and other apartments, et cetera, that are either planned or just recently added," Dean stated "[w]e did not." According to Dean, any potential increase in traffic from other development in the area, though unaccounted for by his traffic assessment, would only lessen the impact of the proposed hotel. Dean testified:

MR. DEEN: . . . Now, like you said, there are other developments that would come in that would be growth that would be inherent to an area. But what I would argue would be that if we don't include that traffic, our site will appear to have a greater impact than it will at those times.

So if there's more traffic, if there's more traffic on the network, then our 70 trips will be a smaller percentage than they are today. Does that make sense?

. . . .

MR. DEEN: Okay. And I would argue that if the volumes were truly higher than our site, traffic would be an even smaller percent than it already was.

MAYOR MANHEIMER: That doesn't make sense.

A member of the public, Charles Rawls, raised the issue of a potential "blind hill" near the hotel's proposed parking garage, "turn[ing] from Haywood Street heading south on French Broad." Mr. Dean, when asked if he had studied whether the entrance and exit of the hotel's proposed two hundred space parking garage could adversely affect safety, stated:

> I have not. We did not conduct a sight distance check, which is typically what's required. But DOT typically requires driveways to meet certain sight distance requirements, whether vehicles are stopping or turning or making decisions, like you said, a vehicle entering a driveway. So DOT typically requires certain standards to be met. We didn't do that because we weren't involved in the actual design of the site.

The City Council also asked PHG about issues with parking, of which PHG acknowledged, "of course we're aware that there are parking issues in the area." In particular, the City Council asked about the capacity of the hotel's proposed parking deck:

> COUNCILMAN SMITH: How many spaces are there?
>
> MR. OAST: 200.
>
> COUNCILMAN SMITH: And 185 rooms and how many employees?
>
> MR. WALDEN:Roughly 75.
>
> COUNCILMAN SMITH: Where are the employees going to park?
>
> MR. WALDEN: In that general area.
>
> COUNCILMAN SMITH: Okay. So there will be an impact. That's another impact. That's helpful to know.
>
> . . . .
>
> COUNCILMAN YOUNG: And approximately 75 employees?
>
> MR. WALDEN: Yes, Sir.
>
> COUNCILMAN YOUNG: And the employees will probably park in the adjacent area?
>
> MR. WALDEN: Yes.

PHG, which also owns the recently opened "Hyatt Place" across the street from the proposed hotel, confirmed that some of the Hyatt Place's employees were using the site of the proposed hotel for parking:

> COUNCILWOMAN MAYFIELD: Where do your employees who work at this Hyatt Place park? Do they park in that hotel's deck?
>
> MR. WALDEN: They park on site here at Hyatt Place, and then they do use part of our -- our lot right now across the street, as well as the -- around the surrounding area.
>
> . . . .
>
> COUNCILMAN YOUNG: So when it's built, if it's built, the adjacent -- the parking that your employees use across the street now will go away.
>
> MR. WALDEN: Yes.
>
> COUNCILMAN YOUNG: And on top of that will go away, you would also incur parking from the current employees that will be employed by the Embassy now. So the people across the street parking would lose their parking now, and the current employees would also have to find parking.
>
> MR. WALDEN: Yes, sir, but in a very limited capacity.
>
> . . . .
>
> COUNCILWOMAN MAYFIELD: I'm not hearing you say directly that you will provide parking for all of you employees in that -- in that deck.
>
> And so the concern is that this -- this hotel would be adding to the -- would be bringing more people there on a daily basis, the workers who work at the hotel --
>
> MR. WALDEN: Right.
>
> COUNCILWOMAN MAYFIELD: -- and not provide them a place to park, which would make parking in that area even more difficult.
>
> MR. WALDEN: Sure.
>
> COUNCILWOMAN MAYFIELD: So that's a concern.

> MR. WALDEN: Sure.
>
> COUNCILWOMAN MAYFIELD: Is that a valid concern, or can you tell us that you[r] employees will have a place to park in that deck on a regular basis and will not be adding to the already overloaded shortage -- that's not -- adding to the shortage of parking that's already there.
>
> MR. WALDEN: I do not feel that our employees would add to that burden. I feel that it's sufficient within the amount of spaces that we have. With valet and a number of spots, I do not feel that it would add an additional burden to the parking situation.

In my view, the City Council's finding that PHG failed to establish that the proposed use "will not cause undue traffic congestion or create a traffic hazard" "is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment." *Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19. Rather, the City Council's decision was based on legitimate concerns that were insufficiently addressed by PHG's evidence, including the exacerbation of the acknowledged parking issues in the area, the potential hazard created by the hotel's driveway, and the impact of recent and planned hotels and other developments on traffic congestion in the area, which was not considered in Mr. Dean's traffic assessment.

In that latter respect, Mr. Dean suggested that any traffic congestion unaccounted for in his assessment would only lessen the proposed hotel's impact on traffic because the hotel's impact would then amount to a smaller percentage of overall traffic in downtown Asheville. This assertion, however, does not address what is required by the ordinance. For example, it does not address whether Mr. Dean's earlier conclusions that "study intersections are expected to continue to operate at acceptable levels of service with only minor increases in delay" and that "simulations show no queuing issues at any of the study intersections" would be affected when the impact of the proposed hotel is assessed in conjunction with the realities of the traffic impact from the major developments not considered by Mr. Dean's assessment.

Moreover, Mr. Dean also failed to explain why it was appropriate to use a Thursday in November to examine the potential for traffic congestion in downtown Asheville, "the hub of . . . tourist activity in Western North Carolina." While the majority assigns some talismanic quality to Mr. Dean's assertion that this was an "industry standard," Mr. Dean never elaborated on the nature of this standard or, more importantly, explained

why this undefined "industry standard" was an appropriate method of addressing the specific requirement in *this* municipal ordinance—that is, whether the proposed hotel in downtown Asheville, along with its "detached, multi-level parking garage" and "5000 square feet of meeting space, that . . . will create its own demand," will cause undue traffic congestion or create a traffic hazard. Absent such an explanation, it was not arbitrary or capricious for the City Council to find unpersuasive the use of a weekday in November to assess potential traffic congestion in downtown Asheville.

The majority, noting that "[w]hen an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, [p]rima facie he is entitled to it," *Humble Oil*,[6] 284 N.C. at 468, 202 S.E.2d at 136, asserts that PHG was only required to meet a burden of production to establish a *prima facie* case. This ignores the plain language of Asheville's ordinance ("The Asheville City Council *shall not approve* the conditional use application . . . *unless and until it makes the following findings*" (emphases added)), which, like

6. In *Humble Oil*, the Court determined that the Board of Alderman's denial of the petitioner's permit application must be set aside because the Board did not refer the application to the Planning Board for review before acting on it, as required by the ordinance. *Humble Oil*, 284 N.C. at 466-68, 202 S.E.2d at 135–36. The Court did not address whether the petitioner met its prima facie burden and the Court's only references to "de novo" were in its statements that on remand the Board of Alderman must "consider Humble's application De novo." *Id.* at 471, 202 S.E.2d at 138. The Court did "deem it expedient" to also address on appeal the Board's finding that the proposed use "would materially increase the traffic hazard and danger to the public at this intersection" and to determine whether the finding "is arbitrary in that it is unsupported by competent, material, and substantial evidence." *Id.* at 468, 202 S.E.2d at 136. The Court determined that the anecdotal evidence purportedly supporting this finding was "unsupported by factual data or background," and therefore incompetent and insufficient to support the finding. *Id.* at 469, 202 S.E.2d at 136. Unlike the Asheville City Council's finding here that PHG did not meet its prima facie burden because it "failed to produce competent, material and substantial evidence that the Hotel *will not* cause undue traffic congestion or create a traffic hazard," which is based on the absence of evidence, the Board of Alderman's finding in *Humble Oil* is an affirmative finding ("*would materially increase* the traffic hazard and danger") purporting to be based on evidence in the record contrary to the petitioner. The significance of this distinction is illustrated in *Mann Media*, in which the Court held that the Planning Board's affirmative finding "that ice has formed and fallen *from the other towers* . . . and is likely to do so from the proposed tower, and *would therefore materially endanger* the public safety" was based on anecdotal hearsay and not supported by competent evidence; yet, the Court held that in light of the petitioners' inability to state with sufficient certainty that there was no danger from "the potential of ice falling *from support wires of the proposed tower*," under the whole record test, the Planning Board's "finding that petitioners failed to establish that there *would be no danger* to the public from falling ice is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment." *Mann Media*, 356 N.C. at 16–17, 565 S.E.2d at 19 (emphases added).

the ordinance in *Mann Media*, places the burden of persuasion on the applicant, requiring the applicant to prove to the fact-finder—here the City Council—each of the necessary standards. *See Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19 (stating that "[t]he burden is on petitioners to meet the four requirements of the Ordinance before finding that a *prima facie* case has been established, and respondent did not state in its written order that petitioners made a *prima facie* case," and that "petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case"). In other words, "the facts and conditions which the ordinance requires for the issuance of" the permit are that the City Council specifically makes the seven relevant findings, including that "[t]hat the proposed use will not cause undue traffic congestion or create a traffic hazard."

Moreover, the majority ignores that under *Mann Media*, the City Council's determination of whether PHG established a *prima facie* case is reviewed under the whole record test, pursuant to which "we are not permitted to substitute our judgment for that of respondent." *Id.* at 17, 565 S.E.2d at 19; *see also id.* at 17, 565 S.E.2d at 19 (stating that "[u]nder the whole record test, [a] finding must stand unless it is arbitrary and capricious" and that the Planning Board's "finding that petitioners failed to establish that there would be no danger to the public from falling ice is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment."). Instead, the majority erroneously applies de novo[7] review and substitutes its own judgment for that of the City Council.

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7. Notably, the legislature recently amended N.C.G.S. § 160A-393(k), providing that "[w]hether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo." PHG contends that this "clarifying" amendment renders the appeal moot because it answers "[t]he central question" here of "what standard of review applies to a municipality's denial of a conditional use permit when the denial is based on an alleged failure to present a prima facie case." Yet, the question of "[w]hether the record contains" a sufficient quantum of evidence is an inquiry into a party's burden of production. Asheville's ordinance, like the ordinance in *Mann Media*, specifically requires the applicant to meet a burden of persuasion, mandating that the "City Council *shall not approve* the conditional use application . . . *unless and until it makes the following findings*." (Emphases added.) Thus, as in *Mann Media*, the "*prima facie* case" in this particular context requires an applicant to meet, not a burden of production (i.e. producing evidence from which the City Council *could* find that the proposed use will not cause undue traffic congestion), but a burden of persuasion (producing evidence from which the City Council *does* find that the proposed use will not cause undue traffic congestion). The City Council's finding in this respect is reviewed under the whole record test. *Mann Media*, 356 N.C. at 17–18; 565 S.E.2d at 20.

"The 'arbitrary or capricious' standard is a difficult one to meet." *Id.* at 16, 565 S.E.2d at 19. Because the City Council's finding that PHG failed to prove that the proposed use will not cause undue traffic congestion or create a traffic hazard "is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment," it is not arbitrary or capricious and therefore "must stand." *Id.* at 16, 565 S.E.2d at 19.[8] As such, the Court of Appeals and superior court should be reversed, and the decision of the City Council denying the conditional use permit should be affirmed. Accordingly, I dissent.

Justice HUDSON joins in this dissenting opinion.

DONNA J. PRESTON, ADMINISTRATOR OF THE ESTATE OF WILLIAM M. PRESTON
v.
ASSADOLLAH MOVAHED, M.D., DEEPAK JOSHI, M.D., AND PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED, D/B/A VIDANT MEDICAL CENTER

No. 124PA19

Filed 3 April 2020

Medical Malpractice—pleadings—Rule 9(j) affidavit—sufficiency

The plaintiff in a medical malpractice action satisfied her responsibility under N.C.G.S. § 1A-1, Rule 9(j) by obtaining the opinion of a doctor whom she reasonably expected to meet the test for qualification on the question of whether defendant violated the standard of care for cardiologists in reading the decedent's exercise treadmill stress test and EKG recordings and communicating those results to the ordering physician. Taking the evidence in the light most favorable to the plaintiff, while it was reasonable to infer that the expert was unwilling to testify against defendant purely on the basis of the report, some of which the expert was not qualified to address, he was willing to testify that defendant's failure to submit the report or otherwise communicate the results was a breach of the standard of care. Furthermore, Rule 9(j) does not require that both the defendant and the testifying witness have exactly the same qualifications.

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8. Because PHG failed to prove this requirement of the ordinance, it is unnecessary to address the remaining requirements. *Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19 (stating that "petitioners failed to meet their burden of proving this first requirement and did not establish a prima facie case," and that "[b]ecause of this holding, we are not obligated to address the remaining three requirements under the Ordinance").

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 825 S.E.2d 657 (N.C. Ct. App. 2019), affirming an order entered on 25 October 2017 by Judge Jeffery B. Foster in Superior Court, Pitt County. Heard in the Supreme Court on 7 January 2020.

Edwards Kirby, L.L.P., by John R. Edwards, David F. Kirby, and Mary Kathryn Kurth, and Laurie Armstrong Law, PLLC, by Laurie Armstrong, for plaintiff-appellant.

Smith Anderson Blount Dorsett Mitchell & Jernigan, LLP, by John D. Madden and Robert E. Desmond, for defendant-appellee Assadollah Movahed, M.D.

EARLS, Justice.

Plaintiff, Donna Preston, the widow and estate representative of William M. Preston, appealed the trial court's order granting the motion to dismiss of defendant, Dr. Assadolah Movahed,[1] on the basis that plaintiff's medical malpractice complaint failed to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. The Court of Appeals affirmed, holding that competent evidence supported the trial court's determination that the expert witness retained by plaintiff to review Mr. Preston's medical care was unwilling to testify that defendant did not comply with the applicable standard of care, notwithstanding that the evidence would support findings to the contrary. *Preston v. Movahed*, 825 S.E.2d 657, 662–65 (N.C. Ct. App. 2019). Because we conclude that in the light most favorable to plaintiff the factual record demonstrates that at the time of the filing of the complaint plaintiff's expert was willing to testify that defendant breached the applicable standard of care and plaintiff reasonably expected him to qualify as an expert, we reverse the decision of the Court of Appeals and remand for further proceedings.

Background

The undisputed facts from the pleadings and evidence before the trial court tend to show that on the morning of 3 February 2014, 54-year-old

1. Defendants Deepak Joshi, M.D., and Pitt County Memorial Hospital, Incorporated, d/b/a Vidant Medical Center were parties in the original appeal but settled with plaintiff prior to the issuing of the Court of Appeals' opinion. They were not parties to the appeal here.

William Preston went to the emergency room at Vidant Medical Center complaining of shortness of breath and left-sided chest pain radiating to his left arm, symptoms that had begun twelve hours earlier. The intake physician noted Mr. Preston's risk factors for coronary artery disease, including hypertension, a history of smoking, and his age, and further noted that Mr. Preston's chest pain was relieved by nitroglycerin. Electrocardiograms (EKGs[2]) taken in the emergency room were abnormal, suggesting myocardial ischemia, a condition where the heart receives insufficient blood flow. After about two hours, Mr. Preston again complained of left arm pain, which was again relieved by nitroglycerin. Mr. Preston was admitted to the hospital for observation and the attending physician ordered further testing, including a "nuclear stress test."

In a nuclear stress test, an EKG is taken while the patient exercises on a treadmill. The "nuclear" aspect involves injecting the patient with a "radiotracer" dye and using gamma rays to produce images of the patient's heart. During Mr. Preston's test that took place on the following day, he reported severe "chest pain and left arm pain at a level of 10/10" and the test was terminated due to shortness of breath and fatigue.

Defendant, a nuclear cardiologist, was assigned to read and interpret the results of Mr. Preston's stress test. In his deposition, defendant explained that when interpreting the results of a nuclear stress test, he receives a document with the patient's information and medical history, EKG "tracings" from the exercise portion of the test, and the nuclear images. Defendant stated that he reviews this information "stage by stage," beginning with the patient's history and risk factors, then reviewing the EKG tracings, and then finally the nuclear images. According to defendant, he "complete[s] one study, finish[es] with the study," and moves to the next, making findings at each stage before making ultimate findings and preparing a report.

Here defendant received Mr. Preston's information sheet, which noted Mr. Preston's use of tobacco, his hypertension, of which there was a family history, and his chest pain. With respect to the EKG tracings, defendant's written report noted that there was "no definite significant additional diagnostic ST segment depression or ST segment elevation recorded during exercise and recovery." Regarding the nuclear images, defendant's report noted a perfusion defect in the heart, which he thought was likely due to "significant gas in the stomach" but could not rule out ischemia. His report stated that "one may consider coronary

2. The filings in the trial court and the parties' briefs refer to electrocardiograms interchangeably as EKGs and ECGs. We use only the term EKG for consistency.

CTA for further evaluation of coronary arteries in addition to aggressive risk factor modification."[3] Defendant gave an oral report of his interpretation of the results of the test to his first-year cardiology fellow, Dr. Deepak Joshi, who entered a "fellow note" into Mr. Preston's chart. The note stated: "[n]uclear stress test showed mild ischemia versus attenuation artifact in the inferolateral/inferior apical area. Discussed with Dr. Movahed, attending. Recommend outpatient cardiac CTA. Will arrange for the test and outpatient cardiology follow-up. Plan discussed with primary team."

Dr. Neha Doctor, a hospitalist, examined Mr. Preston after the nuclear stress test. Plaintiff alleges that she and Mr. Preston were informed that the cardiac tests had been negative and that Mr. Preston's left-sided pain was likely neurological, not heart-related. Dr. Doctor discharged Mr. Preston with instructions to follow up with his primary care physician about an MRI and to follow up with the CT angiogram (CTA) appointment made by the cardiology team. This outpatient cardiology follow-up was scheduled for sixteen days later on 20 February 2014.

Two days after being discharged, Mr. Preston saw his primary care physician, who referred him for an MRI of his spine. The MRI showed no neurological cause for Mr. Preston's continuing left arm pain.

On 13 February 2014, a week before his scheduled cardiac follow-up, Mr. Preston was at home when he called out to his wife. When plaintiff reached her husband, she found him collapsed on the floor and unresponsive. Responding to Plaintiff's 911 call, EMS found Mr. Preston pulseless and breathing about four times per minute, and therefore began resuscitation measures and transporting him to Vidant Medical Center. At Vidant's Emergency Department, further resuscitation efforts were unsuccessful and Mr. Preston was pronounced dead at 5:35 that afternoon. An autopsy revealed severe narrowing of the circumflex and right coronary arteries, acute and evolving myocardial infarction, and transmural rupture of the left ventricular wall of Mr. Preston's heart.

On 25 November 2015, plaintiff filed a wrongful death action (the First Complaint) naming multiple defendants involved in Mr. Preston's medical care, including Dr. Neha Doctor. In accordance with the special pleading requirements of section (j) (Medical malpractice) of Rule 9 (Pleading special matters) of the North Carolina Rules of Civil Procedure, plaintiff alleged in the complaint that the medical care and medical

3. Defendant testified that aggressive risk factor modification refers to activities like ceasing smoking, losing weight, exercising, and using a low-dose aspirin.

records pertaining to Mr. Preston's treatment had been reviewed by a person reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence and who was willing to testify that the medical care did not comply with the applicable standard of care. Dr. Stuart Toporoff, a cardiologist, submitted an affidavit (his First Affidavit) averring that he had reviewed the medical care and records and was willing to testify that the care provided failed to comply with the applicable standard of care. On 29 January 2016, Dr. Doctor filed an answer alleging that Dr. Movahed's written report of Mr. Preston's stress test was not available to her when she was treating Mr. Preston, and that the cardiology team had recommended and taken responsibility for scheduling Mr. Preston's outpatient follow-up CTA.

On 12 February 2016 plaintiff filed a second complaint (the Second Complaint) naming as defendants Dr. Movahed, Dr. Deepak Joshi, and Pitt County Memorial Hospital, Inc., d/b/a Vidant Medical Center (the Hospital). Plaintiff's Second Complaint, which again included her Rule 9(j) expert certification, alleged that defendant was negligent by, *inter alia*, failing to "accurately interpret and communicate the findings and significance of diagnostic tests performed on Mr. Preston," failing to "timely suggest and perform a full assessment and work-up to rule out life-threatening acute coronary artery disease for a patient at high risk for the disease, including but not limited to, cardiac catheterization," and failing "to recommend a cardiology consult for Mr. Preston prior to his discharge from Vidant Medical Center with acute chest pain." On the same day the Second Complaint was filed, Dr. Toporoff submitted a second affidavit (his Second Affidavit) stating that he had reviewed the medical care and records and was willing to testify that the care provided by the named defendants failed to comply with the applicable standard of care. Dr. Toporoff averred that the case materials were first provided to him in July of 2015 and that "[a]dditional materials were provided to [him] on October 12 and October 29, 2015 and on February 10, 2016." According to the affidavit, Dr. Toporoff's stated that based on his review of the medical records and his training and experience,

> [i]t is my opinion that medical care provided to William Preston during his admission to Vidant Medical Center on February 3–4, 2014 for chest pain failed to comply with the applicable standard of care for the evaluation of a patient with chest and arm pain who presented with Mr. Preston's signs, symptoms, and medical history. . . . I have expressed my willingness to testify to the above if called upon to do so.

By consent order filed 14 March 2016, the two actions were consolidated for discovery and trial.

During a subsequent deposition on 23 March 2017, Dr. Toporoff testified that he was critical of defendant's interpretation and communication of the results of the nuclear stress test. Dr. Toporoff stated that he had initially been unwilling to testify against defendant because he was not qualified to criticize defendant's interpretation of the nuclear images from the test and that he "refused to be a nuclear cardiologist against him." Dr. Toporoff confirmed, however, that at the time he submitted his Second Affidavit he was comfortable stating that defendant "failed to meet the standard of care as it applies to a cardiologist interpreting a treadmill stress test."

On 16 June 2017, defendant filed a motion to dismiss pursuant to Rules 12(b)(6), 9(j) and 41 of the North Carolina Rules of Civil Procedure. On 15 September 2017, Dr. Toporoff submitted a third affidavit (his Third Affidavit), stating that prior to the First Complaint he communicated to plaintiff's counsel that he did not have sufficient information to state that defendant and/or Dr. Joshi clearly violated any standards of care. However, Dr. Toporoff stated that following discovery answers served by Vidant Medical Center and Dr. Doctor regarding the communication of Mr. Preston's stress test results by defendant and Dr. Joshi, he learned "that Dr. Movahed's report was NOT made available to [Dr. Doctor] prior to Mr. Preston's discharge." Dr. Toporoff averred that he informed plaintiff's counsel on 12 February 2016 that he was willing to testify that defendant and Dr. Joshi breached the applicable standard of care by "fail[ing] to interpret, diagnose, document and communicate to the ordering physician the presence of chest pain and ST wave depression changes during Mr. Preston's nuclear stress test that were consistent with ischemia; and failure to recommend an immediate cardiology consult for Mr. Preston prior to his discharge." Dr. Toporoff stated that he held these opinions "[s]ince [his] review of the totality of these medical records and documents in February in 2016."

At the hearing on the motion to dismiss on 18 September 2017, defendant argued that plaintiff failed to comply with Rule 9(j) because Dr. Toporoff could not reasonably be expected to qualify as an expert witness and was not willing to testify that defendant breached the applicable standard of care. The trial court entered an order on 25 October 2016, in which it found, in pertinent part:

> 22. Dr. Toporoff . . . admitted that Dr. Movahed's involvement was limited to the interpretation of the nuclear stress test that was performed on Mr. Preston.

. . . .

> 24. Dr. Toporoff only agreed to testify in the Second Lawsuit if Plaintiff's counsel retained a nuclear cardiologist.
>
> . . . .
>
> 27. [A]s of the date the Second Lawsuit was filed, Plaintiff had no cardiologist competent or willing to testify against . . . Dr. Movahed.

The trial court also found that plaintiff could not have reasonably expected Dr. Toporoff to qualify as an expert witness. Accordingly, the trial court concluded that plaintiff failed to comply with Rule 9(j) and granted defendant's motion to dismiss. On 3 November 2017, a Consent Order was entered on the parties' Consent Motion to Sever the two cases for appeal. Plaintiff appealed this case to the Court of Appeals.

At the Court of Appeals,[4] plaintiff argued, *inter alia*, that the trial court's Findings 22, 24, and 27 were not supported by competent evidence and that the trial court erred in concluding that plaintiff failed to comply with Rule 9(j). The court disagreed, first stating that the standard of review was de novo and that:

> [w]here, as here, "a trial court determines a Rule 9(j) certification is not supported by the facts, 'the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination.' "

Preston, 825 S.E.2d at 662 (quoting *Estate v. Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 403 (2012)).

Applying this standard, the court first addressed plaintiff's challenge to Finding of Fact 22 and concluded that it was supported by the following exchange from Dr. Toporoff's deposition:

> Q. You know that Dr. Movahed's involvement in this case is the interpretation of the nuclear stress test that was performed on Mr. Preston? You understand that; correct?

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4. Plaintiff entered into settlement agreements with Dr. Joshi and the Hospital and on plaintiff's motions the Court of Appeals dismissed those parties from the appeal on 15 August 2018 and 13 September 2018, respectively.

A. Yes.

Id. at 662. While Plaintiff contended that "the nuclear stress test involves two parts: the exercise treadmill stress test and the nuclear heart images" and that "Dr. Toporoff was critical of Dr. Movahed's interpretation of the . . . exercise treadmill portion, which revealed issues with Mr. Preston's heart requiring immediate further testing," the court determined that plaintiff's explanation did not make the challenged finding erroneous because "[t]he well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding." *Id.* at 662 (quoting *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994)).

The court next addressed plaintiff's argument that Finding 24 was erroneous because Dr. Toporoff: (1) opined in his Rule 9(j) affidavits that Preston's medical care failed to comply with the standard of care and "expressed [his] willingness to testify to the above if called upon to do so"; and (2) testified when deposed that, at the time he signed his Second Affidavit prior to the filing of the Second Complaint, he "felt comfortable saying that Dr. Movahed failed to meet the standard of care as to the interpretation of the exercise treadmill test." *Id.* at 662. The court determined that Dr. Toporoff's deposition testimony, including his testimony that "he would not testify against Dr. Movahed unless [plaintiff] came up with a nuclear cardiologist" provided competent evidence directly supporting the trial court's challenged finding, even if Dr. Toporoff's Rule 9(j) affidavits or other deposition testimony could support a different finding. *Id.* at 663. Further, the court rejected plaintiff's efforts to distinguish between Dr. Toporoff's opinions of defendant's interpretation of the NST images as opposed to the results of the treadmill stress test. *See id.* ("Plaintiff emphasizes Dr. Toporoff's later deposition testimony in which he confirmed he "had opinions separate and apart from the NST images" and was "comfortable . . . when [he] did the 9(j) affidavit[ ] . . . saying that Dr. Movahed failed to meet the standard of care as it applies to a cardiologist interpreting a treadmill stress test[.]"). According to the court:

> Dr. Toporoff's statement that he "had opinions separate and apart from the NST images" was immediately followed by his confirmation that he "didn't feel as confident expressing those [opinions] until [he] had some kind . . . of support for the NST images as well." Moreover, merely having an opinion does not indicate one's willingness to testify as to that opinion. Additionally, Dr. Toporoff's confirmation that he was "comfortable . . . when [he] did the 9(j) affidavit

> . . . saying that Dr. Movahed failed to meet the standard of care as it applies to a cardiologist interpreting a treadmill stress test" was not an unequivocal assertion that he was "willing to testify" against Dr. Movahed. Regardless of whether Dr. Toporoff had opinions or was comfortable saying something about Dr. Movahed regarding the treadmill-stress-test component of interpreting the NST, Dr. Toporoff's testimony considered contextually establishes that his willingness to testify against Dr. Movahed in any capacity was conditioned upon having the support of a nuclear cardiologist who was competent and willing to testify against Dr. Movahed as to the nuclear-imaging component.

Id.

Next, the court addressed plaintiff's challenge to Finding 27. Having previously concluded that evidence supported the trial court's finding that Dr. Toporoff only agreed to testify if plaintiff retained a nuclear cardiologist, the court noted that the two nuclear cardiologists were consulted months after the Second Complaint was filed and after the statute of limitations had expired and concluded that Finding 27 was supported by competent evidence. *Id.* at 663–64.

Finally, the court reviewed whether the trial court's findings support its conclusions and its ultimate decision to dismiss plaintiff's complaint for substantive Rule 9(j) noncompliance. In light of the findings that Dr. Toporoff was plaintiff's only cardiologist who had reviewed Preston's care before the Second Complaint was filed, that Toporoff only agreed to testify if plaintiff hired a nuclear cardiologist, and that plaintiff failed to consult with the other nuclear cardiologists she retained until months after she filed the Second Complaint, the court determined that the trial court correctly concluded that plaintiff's Second Complaint failed to comply with Rule 9(j) because she had no cardiologist willing to testify against defendant at the time of filing. *Id.* at 665. In light of this conclusion, the court did not address the trial court's determination that plaintiff failed to substantively comply with Rule 9(j)'s requirement that it was reasonable for plaintiff to expect Dr. Toporoff to qualify as an expert witness against defendant. *Id.* at 665.

Plaintiff filed a petition for discretionary review on the general issues of the appropriate legal standard to apply to a motion to dismiss on Rule 9(j) grounds and whether the Court of Appeals erred in failing to conduct a *de novo* review of the trial court's order dismissing the

complaint. Defendant's response to the petition indicated their intent to present to this Court the further issue of whether Dr. Toporoff was qualified to testify against Dr. Movahed. This Court allowed the petition on 14 August 2019.

Analysis

After careful review of the record, we conclude that both of the lower courts erred in failing to view the evidence regarding Dr. Toporoff's willingness to testify under Rule 9(j) in the light most favorable to plaintiff and that the Court of Appeals, in its *de novo* review, erred by deferring entirely to the findings of the trial court.

"Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Vaughan v. Mashburn*, 371 N.C. 428, 434, 817 S.E.2d 370, 375 (2018) (quoting *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012)). The rule provides, in pertinent part:

> Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

N.C.G.S. § 1A-1, Rule 9(j) (2019).[5] Thus, the rule prevents frivolous claims "by precluding any filing in the first place by a plaintiff who is unable to procure an expert who both meets the appropriate qualifications and, after reviewing the medical care and available records, is

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5. The rule also provides that a complaint is in compliance if:

> (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

willing to testify that the medical care at issue fell below the standard of care." *Vaughan*, 371 N.C. at 435, 817 S.E.2d at 375.

In *Moore v. Proper*, this Court addressed the manner in which a trial court should evaluate compliance with Rule 9(j), as well as the standard of review for a reviewing court on appeal. There, the plaintiff filed a medical malpractice complaint against the defendants alleging that the defendants were "negligent in the performance of her tooth extraction and in failing to provide follow-up care." *Moore*, 366 N.C. at 26, 726 S.E.2d at 814. Following a deposition of the plaintiff's Rule 9(j) certification expert, the defendants filed a motion for summary judgment pursuant to Rule 9(j). The trial court granted the defendants' motion and dismissed the plaintiff's case for noncompliance with Rule 9(j), stating: "no reasonable person would have expected [the plaintiff's expert] to qualify as an expert witness under Rule 702." *Id.* at 28, 726 S.E.2d at 815. Following a split decision in the Court of Appeals reversing the trial court, the defendants appealed to this Court.

The Court first addressed whether an expert must actually qualify under Rule 702 in order to satisfy Rule 9(j)'s requirement that the certification expert "is reasonably expected to qualify as an expert witness under Rule 702." The Court noted that "Rule 9(j) . . . operates as a preliminary qualifier to 'control pleadings' rather than to act as a general mechanism to exclude expert testimony." *Id.* at 31, 726 S.E.2d at 817. Moreover, because of the presumption "that that the legislature carefully chose each word used," and in order to "give every word of the statute effect," the Court concluded: "we must ensure that the two questions are not collapsed into one. *Id.* at 31, 726 S.E.2d at 817. Thus, while "[t]he trial court has wide discretion to allow or exclude testimony under" Rule 702, id. at 31, 726 S.E.2d at 817 (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)), "the preliminary, gatekeeping question of whether a proffered expert witness is 'reasonably expected to qualify as an expert witness under Rule 702' is a different inquiry," *id.* at 31, 726 S.E.2d at 817 (citing N.C.G.S. § 1A-1, Rule 9(j)); *see also id.* at 31, 726 S.E.2d at 817 (stating that "a trial court must analyze whether a plaintiff complied with Rule 9(j) by including a certification complying with the Rule before the court reaches the ultimate determination of whether the proffered expert witness actually qualifies under Rule 702").

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(3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C.G.S. 1A-1, Rule 9(j).

In addressing the Rule 9(j) inquiry, the Court explained that "[b]ecause Rule 9(j) requires certification at the time of filing that the necessary expert review has occurred, compliance or noncompliance with the Rule is determined at the time of filing." *Id.* at 31, 726 S.E.2d at 817 (citations omitted). The Court agreed with previous Court of Appeals precedent holding that "a court should look at 'the facts and circumstances known or those which should have been known to the pleader' at the time of filing," *id.* at 31, 726 S.E.2d at 817 (quoting *Trapp v. Maccioli*, 129 N.C. App. 237, 241, 497 S.E.2d 708, 711 (1998)), "as any reasonable belief must necessarily be based on the exercise of reasonable diligence under the circumstances," *id.* at 31, 726 S.E.2d at 817 (citing *Fort Worth & Denver City Ry. Co. v. Hegwood*, 198 N.C. 309, 317, 151 S.E. 641, 645 (1930)). Additionally, the Court noted that "a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable." *Id.* at 31–32, 726 S.E.2d at 817 (citing *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 255, 677 S.E.2d 465, 477 (2009); *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008)). The Court further explained:

> Though the party is not necessarily required to know all the information produced during discovery at the time of filing, the trial court will be able to glean much of what the party knew or should have known from subsequent discovery materials. But to the extent there are *reasonable* disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage of determining whether the party *reasonably expected* the expert witness to qualify under Rule 702. When the trial court determines that reliance on disputed or ambiguous forecasted evidence was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination. We note that because the trial court is not generally permitted to make factual findings at the summary judgment stage, a finding that reliance on a fact

> or inference is not reasonable will occur only in the rare case in which no reasonable person would so rely.

Id. at 32, 726 S.E.2d 817–18 (citations omitted).

Applying this standard, the *Moore* Court—construing all disputes or ambiguities in the factual record in favor of the plaintiff—determined that plaintiff's complaint complied with Rule 9(j) in that plaintiff reasonably expected her proffered expert to qualify under Rule 702. *Id.* at 35, 726 S.E.2d at 819–20. The Court expressed no opinion on whether the plaintiff's expert would actually qualify under Rule 702 and "note[d] that, having satisfied the Rule 9(j) pleading requirements, plaintiff has survived the pleadings stage of her lawsuit and may, at the trial court's discretion, be permitted to amend the pleadings and proffer another expert" in the event that her proffered expert later failed to qualify under Rule 702. *Id.* at 36, 726 S.E.2d at 820.

While the Rule 9(j) issue in *Moore* arose in the context of a motion for summary judgment and focused specifically on whether the plaintiff's expert was reasonably expected to qualify as an expert witness, we conclude that the analytical framework set forth in *Moore* applies equally to other Rule 9(j) issues in which "a complaint facially valid under Rule 9(j)" is challenged on the basis that "the certification is not supported by the facts." *Id.*, 366 at 31–32, 726 S.E.2d at 817 (citing *Barringer*, 197 N.C. App. at 255, 677 S.E.2d at 477). For instance, where, as here, a defendant files a motion to dismiss under Rule 12(b)(6) challenging a plaintiff's facially valid certification that the reviewing expert was willing to testify at the time of the filing of the complaint, the trial court must examine " 'the facts and circumstances known or those which should have been known to the pleader' at the time of filing," *id.* at 31, 726 S.E.2d at 817 (quoting *Trapp*, 129 N.C. App. at 241, 497 S.E.2d at 711), and "to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage," *id.* at 32, 726 S.E.2d 817–18 (citations omitted). "When the trial court determines that reliance on disputed or ambiguous forecasted evidence was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence." *Id.* at 32, 726 S.E.2d at 818 (citations omitted).

We stress that Rule 9(j) is unique and that because the evidence must be taken in the light most favorable to the plaintiff, the nature of these "findings," and the "competent evidence" that will suffice to

support such findings, differs from situations where the trial court sits as a fact-finder. We do not view the legislature's enactment of Rule 9(j) as intending for the trial court to engage in credibility determinations and weigh competent evidence at this preliminary stage of the proceedings. *See id.* at 31, 726 S.E.2d at 817 (stating that Rule 9(j) "operates as a preliminary qualifier to 'control pleadings' rather than . . . as a general mechanism to exclude expert testimony" (citing *Thigpen*, 355 N.C. at 203–04, 558 S.E.2d at 166)); *see also State v. Dew*, 225 N.C. App. 750, 760, 738 S.E.2d 215, 222 (2013) ("[T]he credibility of and weight to be given to the expert's testimony is a question for the jury rather than the trial court." (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 460–61, 597 S.E.2d 674, 687–88 (2004))). Thus, it is erroneous to conclude, as the Court of Appeals did here with respect to the trial court's findings regarding Dr. Toporoff's willingness to testify, that a Rule 9(j) "finding" "supported by competent evidence [is] binding on the appellate courts even if the evidence would support a contrary finding." *Preston*, 825 S.E.2d at 662 (quoting *Scott*, 336 N.C. at 291, 442 S.E.2d at 497).

Defendant here agrees that *Moore* supplies the appropriate standard for evaluating plaintiff's compliance with Rule 9(j) but nevertheless contends that the factual record clearly demonstrates Dr. Toporoff's unwillingness to testify such that there is no *reasonable* dispute or ambiguity in the evidence. Defendant argues that the evidence establishes that Dr. Toporoff was not willing to testify unless plaintiff retained a nuclear cardiologist and that plaintiff did not retain a nuclear cardiologist at the time of the filing of the Second Complaint. Thus, defendant contends that the trial court's finding that Dr. Toporoff was not willing to testify at the time of filing was supported by the evidence and the trial court's conclusion that plaintiff's complaint failed to comply with Rule 9(j) was supported by the findings.

On the other hand, plaintiff argues that the trial court mistakenly interpreted evidence of Dr. Toporoff's unwillingness to testify against defendant at the time of the First Complaint as evidence that he was unwilling to testify against defendant at the time of the Second Complaint (in which defendant was added to the lawsuit) and also failed to apprehend that a "nuclear stress test" contains separate and distinct parts: (1) the EKG treadmill test, about which Dr. Toporoff is undisputedly qualified to testify; and (2) interpretation of the nuclear images. According to plaintiff, taking the evidence in the light most favorable to plaintiff, the factual record clearly demonstrates that after receiving new information in Dr. Doctor's Answer following the filing of the First Complaint, Dr. Toporoff was willing at the time of the filing of the Second Complaint to testify against defendant without the need for any nuclear cardiologist

on the basis that defendant failed to meet the standard of care as a cardiologist interpreting a treadmill stress test—specifically, by failing to accurately interpret and document the EKG treadmill test, failing to timely and effectively communicate the results to the hospitalist, and failing to recommend a cardiac consult prior to Mr. Preston's discharge.

We conclude that taking the evidence in the light most favorable to plaintiff, including Dr. Toporoff's affidavits and his deposition testimony, the factual record clearly supports a reasonable inference that at the time of the filing of the Second Complaint Dr. Toporoff was willing to testify that defendant failed to comply with the applicable standard of care as a cardiologist.

Here, plaintiff's compliance with Rule 9(j) is measured at the time of the filing of the Second Complaint on 12 February 2016, as that was when Dr. Movahed was added as a defendant in the action. *See Moore*, 366 N.C. at 31, 726 S.E.2d at 817 ("[C]ompliance or noncompliance with the Rule is determined at the time of filing." (citations omitted)). In his Second Affidavit, submitted at the time of the filing of the Second Complaint, Dr. Toporoff averred that:

> [I]t is my opinion that medical care provided to William Preston during his admission to Vidant Medical Center on February 3 – 4, 2014 for chest pain, failed to comply with the applicable standard of care for the evaluation of a patient with chest and arm pain who presented with Mr. Preston's signs, symptoms and medical history. I first expressed this opinion to Ms. Armstrong on August 1, 2015 and I provided additional opinion on September 20, 2015, on October 28, 2015 and on February 9, 2016. I have expressed my willingness to testify to the above if called upon to do so.

The ambiguity in Dr. Toporoff's willingness to testify involves his deposition testimony. In Dr. Toporoff's 23 March 2017 deposition, he had difficulty remembering when he formed his opinions of defendant. Dr. Toporoff testified that he had not formulated any opinions regarding defendant prior to the First Complaint in 2015, explaining that he told plaintiff he was unwilling to testify against defendant unless she retained a nuclear cardiologist:

> A: It's coming back to me. I think I had always been critical of Dr. Movahed and I told [plaintiff's counsel] that I did not feel competent in criticizing him because I knew what would happen in the sense that he would put up these images and I would look like a fool trying to interpret the images.

> And I believe I said to her I would not add him to my lawsuit unless she got another nuclear cardiologist to interpret the images. I did not want to get into an across-the-table where he is highly competent in that field on paper and I have no business criticizing his summaries.
>
> Q. Because you're not qualified as –
>
> A. Correct.
>
> Q. – a nuclear cardiologist?
>
> A. That's how his name got added later. I refused to be a nuclear cardiologist against him.
>
> Q. Sure.
>
> A. That, I think, is what happened.
>
> Q. Because you're not a nuclear cardiologist?
>
> A. Absolutely.
>
> Q. So it would be inappropriate for you to render any opinions –
>
> A. Right.
>
> Q. – regarding Dr. Movahed because of that.
>
> A. But that's why his name was left out the first time.

At different points later in the deposition, Dr. Toporoff testified:

> A. At the beginning, I just wanted to make it clear, because I remember a conversation I had with [Plaintiff's attorney], that I would not testify against Dr. Movahed unless she came up with a nuclear cardiologist because I did not want to be across from him where he's talking about nuclear images and I have to say, I know nothing. And once we agreed that she would get somebody else, then I felt I could handle myself clinically.
>
> . . . .
>
> Q. I think you said earlier that you initially did not feel competent to give testimony as to Dr. Movahed, but you told [plaintiff's counsel] that if she got a nuclear guy, then you would feel competent to give testimony and I'm not sure I understood why you said that.

> A. I anticipated that if it were just my testimony against [defendant], he would say I had no business in making any judgment about his readings and what he does with them, and he would be completely correct.
>
> But once I didn't have to worry about anything about looking at this doughnut hole [the nuclear images] and what do you think of it, then I felt much, much more comfortable because it was a clinical situation purely.
>
> Q. All Right. So you had opinions separate and apart from the NST images, but you didn't feel as confident expressing those until you had some kind –
>
> A. Correct.
>
> Q. -- of support for the NST images as well?
>
> A. Correct.

While this testimony is ambiguous as to whether Dr. Toporoff's condition that plaintiff retain a nuclear cardiologist continued beyond the time of the filing of the First Complaint, the testimony still appears to be focused on the time period prior to the filing of the First Complaint (i.e. "at the beginning") and in it Dr. Toporoff expressed his concern that his criticisms of defendant were not sufficiently distinct from defendant's interpretation of the nuclear images such that he was willing to testify against defendant as a "cardiologist" at that time—as Dr. Toporoff put it, he "refused to be a nuclear cardiologist against him." Significantly, we note that later in the deposition Dr. Toporoff testified as follows regarding the time of the filing of the Second Complaint when he submitted his Second Affidavit:

> Q. And going back [to] your testimony about your opinions about Dr. Movahed in this case, you explained to [defendant's counsel] on the record that you were not comfortable testifying as to the nuclear imaging interpretation by Dr. Movahed.
>
> Were you comfortable and do you remain comfortable at the time – *at this time when you did the 9(J) affidavit*, [emphasis added] were you comfortable saying that Dr. Movahed failed to meet the standard of care as it *applies to a cardiologist* [emphasis added] interpreting a treadmill stress test?
>
> A. Yes.

This "cardiologist" distinction is significant as a full reading of Dr. Toporoff's deposition, along with Dr. Toporoff's third affidavit, taken in the light most favorable to plaintiff clearly supports the inference urged by plaintiff—that the nature of Dr. Toporoff's opinions concerning defendant significantly changed when, following the filing of the First Complaint, he realized that Dr. Movahed's written report of the nuclear stress test, which had been included in the medical files that he previously reviewed, had not actually been included in Mr. Preston's medical chart—and therefore was not seen by Dr. Doctor—until after Mr. Preston was discharged from the hospital.

Dr. Toporoff testified that he first reviewed defendant's involvement in the case when he received the medical files in 2015 prior to the filing of the First Complaint, stating that "you couldn't not see it when you were reviewing the entire case" and that he "didn't understand why [defendant's] report had not commented on two important issues during the nuclear study, namely the fact that the man had chest pain on the treadmill and that there were EKG changes that were either ignored or not noticed." Thus, at the beginning Dr. Toporoff was critical of defendant's report as it related to Mr. Preston's chest pain and the EKG tracings from the exercise portion of the stress test. Dr. Toporoff noted that he "do[es] about 250 to 300 treadmills a year" and explained that two of the ways you can "flunk" a stress test are "if the test provokes chest pain" and if "EKG changes during the treadmill worsened . . . and fulfilled the criteria for a positive exercise treadmill test for myocardial ischemia." Dr. Toporoff was also critical of the report's suggestion that "one may consider a CTA," a type of angiogram he described as an outpatient procedure that in most cases is "a week or two down the line, as it was in this case." This was the "wrong test," according to Dr. Toporoff, as Mr. Preston needed an immediate "cardiologist consult," which "would have led to a cardiac catheterization which is the test that he really needed."

According to Dr. Toporoff, the plan from the physician ordering the test was that if the nuclear stress test was normal, Mr. Preston would be discharged, and in his view the "stress test was clearly not normal":

> A. The treadmill test was, in my judgment, completely abnormal and consistent with myocardial ischemia. And he thought -- he indicated in the exercise physiology portion that he didn't see any abnormality. I think he was wrong.
>
> Similarly, the chest pain on the treadmill is a very important clinical feature that he did not mention in his final impression.

However, Dr. Toporoff acknowledged that the phrase "chest pain during exercise" was included in the report, that the report did not rule out ischemia, and that the report did not characterize the test as "normal."

Significantly, much of Dr. Toporoff's criticism was reserved not for the report itself, but on the fact that this report was not made available until after Mr. Preston's discharge, and that in its place defendant failed to effectively communicate the significance of the results of the test to the attending doctor, Dr. Doctor. Dr. Toporoff testified that Mr. Preston's death was caused by a "breakdown of the whole system," that he "shouldn't have gone home," and that it started with defendant. According to Dr. Toporoff:

> A. Well, it starts off with that Dr. Joshi is in his second day as a nuclear cardiology fellow, ... And in this particular week or day he was assigned to Dr. Movahed.
>
> Of all the people who read nuclear cardiology tests, it appears that they either typed their own reports right into the electronic medical record.
>
> . . . . Dr. Movahed is the only one who dictated his report, which means the hospital has to hire a transcriptionist and that report does not appear in the chart until the following day.
>
> . . . . [H]e doesn't call the doctor. He assigns Dr. Joshi on his second day to explain the nuclear findings to, in this case, Dr. Doctor because she was the hospitalist of record.

Dr. Toporoff stated that the "report hit the chart February 5th at about 8:30 in the morning . . . and the patient was long gone," and that the "patient was discharged before the report was in the chart and I think [that] was instrumental in allowing Mr. Preston to die." Dr. Toporoff further explained:

> A. Let me amplify. If you're dealing with an outpatient procedure, the guy isn't that sick, he comes in. I'm not going to say that every one at our hospital is ready the same day. You can do it a day or two later. Maybe it's not great medicine, but it's nothing terrible. But when a guy comes in through the emergency room and you rule out MI and he's having chest discomfort, that report should be available that same day.

> Q. And this is a report by a nuclear cardiologist?
>
> A. Yes.
>
> Q. Which you are not?
>
> A. I don't think it matters whether I am or not. I know when a report should be due.

In Dr. Toporoff's view, given the information that defendant possessed, "especially since he knows when that report is going to be available on the computer, I think he should have picked up the telephone himself and called Dr. Doctor and said, You have a problem there. I would get the consulting service to see this patient." As Dr. Toporoff put it, "to have a nuclear cardiology report that's abnormal, you can't just dictate it and walk away. That's wrong."

Further, Dr. Toporoff opined that it would not have been appropriate to delegate such a task to Dr. Joshi, stating "[w]hen a test is that abnormal, I think the physician of record should take no chances and should speak to the doctor himself personally." In that respect, Dr. Toporoff noted that Dr. Joshi's note, which *was* added to the medical chart and received by Dr. Doctor before Mr. Preston's discharge, made no mention of the fact that Mr. Preston experienced chest pain during the treadmill test or of any ST abnormalities.

Thus, a significant portion of Dr. Toporoff's criticism of defendant's conduct was based not on the report that he received with the medical records back in 2015 but rather on the fact that the report was not made available to the attending hospitalist prior to Mr. Preston's discharge. As such, it reasonable to infer that while Dr. Toporoff was unwilling to testify against defendant purely on the basis of the report, part of which he acknowledged he was not qualified to address (the nuclear images) and other portions of which he was critical but also conceded did not characterize the nuclear stress test as normal, he was willing to testify that defendant's failure to submit the report or otherwise communicate the results of the test to the hospitalist was a breach of the standard of care as a cardiologist.

Dr. Toporoff clarified his opinions in his Third Affidavit submitted on 15 September 2017, in which he averred:

> 5) In November of 2015, I signed an Expert Witness Affidavit regarding the hospitalist physicians. Around that time, I communicated to [plaintiff's counsel] that I did not have sufficient information to say that Dr. Movahed and/or Dr. Joshi had clearly violated any standards of care.

> 6) In February of 2016, I again spoke with [plaintiff's counsel], who informed me that she had received additional information through discovery answers served by Vidant Medical Center and Dr. Neha Doctor[6] regarding the communication of Mr. Preston's stress tests results by Drs. Movahed and Joshi.
>
> 7) Based on the representation by Dr. Doctor in those documents of the following information: that Dr. Movahed's report was NOT available to her prior to Mr. Preston's discharge; that Dr. Movahed had specifically made recommendations to the hospitalists, and that Dr. Joshi communicated the results of the nuclear stress test with "cardiology's" recommendation for an outpatient CT angiogram, I informed Ms. Armstrong I was willing to testify that Dr. Movahed and Dr. Joshi violated standards of care in their collaboration and treatment of Mr. Preston.
>
> 8) My criticisms of Drs. Movahed and Joshi include: failures to interpret, diagnose, document and communicate to the ordering physician the presence of chest pain and ST wave depression changes during Mr. Preston's nuclear treadmill stress test that were consistent with ischemia, and failure to recommend an immediate cardiology consult for Mr. Preston prior to his discharge. These are violations of the standard of care.
>
> 9) Since my review of the totality of these medical records and documents in February of 2016, I have held these opinions. I expressed my willingness to testify regarding the standard of care that applied to Drs. Movahed and Joshi in their treatment and care of Mr. Preston to Ms. Armstrong in a phone call on February 12, 2016.

In viewing the evidence in the light most favorable to plaintiff, we conclude that the evidence does not support the trial court's findings that

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6. Dr. Doctor's answer stated:

> [I]t is admitted that the medical records of Mr. Preston contain a report of the nuclear stress test which appears to have been prepared by Dr. Movahed, that this is a written document, which speaks for itself and is the best evidence of what is contained in the report, but it is denied that this written report was available to this Defendant at the time she provided care to Mr. Preston.

"Dr. Toporoff only agreed to testify in the Second Lawsuit if Plaintiff's counsel retained a nuclear cardiologist" and that "as of the date the Second Lawsuit was filed, Plaintiff had no cardiologist competent or willing to testify against . . . Dr. Movahed."[7] Rather, the factual record demonstrates that Dr. Toporoff was willing to testify against defendant at the time of the filing of the Second Complaint. At a bare minimum, we are certain that any ambiguity in the evidence is not so unreasonable such that it should be resolved against plaintiff and result in a finding that plaintiff was unreasonable in her Rule 9(j) certification that Dr. Toporoff was willing to testify against defendant at the time of the filing of the Second Complaint. Thus, the trial court's conclusion that plaintiff failed to comply with the requirements of Rule 9(j) is unsupported by its findings to the extent that it is based on plaintiff's reviewing expert's purported unwillingness to testify against defendant.

The trial court also determined that plaintiff could not have reasonably expected that Dr. Toporoff would qualify as an expert witness, an issue the parties briefed in the Court of Appeals and before this Court. We hold that at the relevant time, again taking the evidence in the light most favorable to plaintiff, plaintiff's expectation that Dr. Toporoff would qualify as an expert to testify in this case was reasonable.

In that respect, we note that in declining to address whether plaintiff reasonably expected Toporoff to qualify under Rule 702, the language of the Court of Appeals suggested—though it is unclear—that the court was declining to address a question of whether Dr. Toporoff would *actually* qualify under Rule 702. *See Preston*, 825 S.E.2d at 664 (stating that "we need not address the sufficiency of evidence supporting that part of the finding as to whether Dr. Toporoff was competent to testify in any capacity against Dr. Movahed" and that Rule 9(j) prevents "any filing in the first place by a plaintiff who is unable to procure an expert who *both* meets the appropriate qualifications and . . . is willing to testify" (quoting *Vaughan*, 371 N.C. at 435 817 S.E.2d at 375)). We reiterate in the interest of clarity that under Rule 9(j) "the preliminary, gatekeeping question of whether a proffered expert witness is 'reasonably expected to qualify as an expert witness under Rule 702' is a different inquiry from whether the expert *will actually* qualify under Rule 702." *Moore*, 366 N.C. at 31,

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7. We conclude that the trial court's Finding 22 ("Dr. Toporoff . . . admitted that Dr. Movahed's involvement was limited to the interpretation of the nuclear stress test that was performed on Mr. Preston.") is supported by the evidence. In his deposition, Dr. Toporoff agreed with this statement; his opinion was that defendant, having been assigned to interpret the nuclear stress test, breached the standard of care by failing to accurately interpret it and communicate its results.

726 S.E.2d at 817 (citing N.C.G.S. § 1A-1, Rule 9(j)(1)). Further, "to the extent there are *reasonable* disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage of determining whether the party *reasonably expected* the expert witness to qualify under Rule 702," and "a finding that reliance on a fact or inference is not reasonable will occur only in the rare case in which no reasonable person would so rely." *Id.* at 32, 726 S.E.2d at 818 (citations omitted).

The standards articulated in *Moore* apply here. As summarized in that case, under Rule 702(b), there is a three-part test to qualify as an expert witness:

> (1) whether, during the year immediately preceding the incident, the proffered expert was in the same health profession as the party against whom or on whose behalf the testimony is offered; (2) whether the expert was engaged in active clinical practice during that time period; and (3) whether the majority of the expert's professional time was devoted to that active clinical practice.

Moore v. Proper, 366 N.C. at 33, 726 S.E.2d at 818 (footnote omitted). The record in this case establishes that like Dr. Movahed, Dr. Toporoff is board-certified in internal medicine and cardiovascular disease. During the relevant time period, and, in fact, for over forty years, Dr. Toporoff has practiced as a cardiologist, engaged in active clinical practice treating patients like Mr. Preston. As part of this clinical work, Dr. Toporoff interprets hundreds of treadmill tests every year, and the treadmill test is the portion of the stress test relevant to the opinions Dr. Toporoff would testify to at trial. There is no dispute that the majority of Dr. Toporoff's professional time was devoted to his active clinical practice. As such, this is not "the rare case" in which plaintiff's reliance was unreasonable. *Id.* at 31, 726 S.E.2d at 818.

Defendant takes the position that because Dr. Toporoff is not a nuclear cardiologist and Dr. Movahed does have that specialized expertise, Dr. Toporoff could not qualify to testify against Dr. Movahed. However, throughout the record as developed so far, Dr. Toporoff has been clear that he is not purporting to offer expert opinions about the nuclear imaging portion of the stress. The rule only requires that an expert witness have experience performing the procedure that is the subject of the complaint and treats similar patients, not that both the defendant and the testifying witness have the exact same professional qualifications. Just as a dentist can testify as an expert on the standards

of care relevant to extracting a tooth in a case where the procedure at issue was actually performed by an oral and maxillofacial surgeon, a cardiologist who annually interprets hundreds of treadmill tests can testify about the standards of care relevant to treadmill tests in a case where the treadmill test results were not properly handled by a nuclear cardiologist. *See, e.g.*, *Roush v. Kennon*, 188 N.C. App. 570, 575–76, 656 S.E.2d 603, 607 (2008). Rule 9(j) is intended as a gatekeeping rule to prevent the prosecution of frivolous malpractice claims, not an endless maze of impossible hurdles to bar juries from hearing meritorious cases. *Moore*, 366 N.C. at 31, 726 S.E.2d at 817.

Here plaintiff satisfied her Rule 9(j) responsibility by obtaining the opinion of a doctor who she reasonably expected to meet the three-part test for qualification under Rule 702(b) on the question of whether defendant violated the standard of care for cardiologists in reading Mr. Preston's exercise treadmill stress test and EKG recordings and communicating those results to Mr. Preston's ordering physicians.

Conclusion

In sum, we conclude that the trial court and the Court of Appeals erred in failing to view the factual record in the light most favorable to plaintiff. The trial court's findings that Dr. Toporoff was not willing to testify at the time of the filing of the Second Complaint are not supported by the evidence. The affidavits and Dr. Toporoff's deposition testimony demonstrate that after receiving new information in Dr. Doctor's answer, Dr. Toporoff was willing to testify at the time of the filing of the Second Complaint that defendant breached the standard of care. Further, it was reasonable for the plaintiff to conclude that Dr. Toporoff's clinical practice as a cardiologist likely qualified him under Rule 702(b) to express expert opinions concerning Mr. Preston's treadmill test. This complaint should not be dismissed on Rule 9(j) grounds. We reverse the Court of Appeals and remand for further proceedings.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

The issue in this case is the standard by which an appellate court reviews a trial court's dismissal of a complaint for noncompliance with N.C.G.S. § 1A-1, Rule 9(j) (2019). In *Moore v. Proper*, this Court held that when a trial court dismisses a claim because it does not comply with Rule 9(j), appellate courts only ask whether competent evidence in the record supports the trial court's findings of fact and those facts

support its decision. 366 N.C. 25, 32, 726 S.E.2d 812, 818 (2012). The majority purports to clarify that standard from *Moore*, but in fact upends it altogether, replacing *Moore*'s appellate deferential standard of review with a de novo standard used to address summary judgment motions. It thus improperly converts this Court into a factfinder, removing that task from the trial court and subverting the trial court's role as gatekeeper. Because the majority removes this critical and historic role from the trial court, it undermines the legislative purpose of Rule 9(j) to properly screen medical malpractice cases.

The trial court determined that a clinical cardiologist was neither willing to testify nor reasonably expected to qualify to testify against an experienced nuclear cardiologist whose sole involvement in the case was the interpretation of a nuclear stress test. The clinical cardiologist by his own admission has not performed a nuclear stress test and cannot interpret nuclear stress test images. The question in this case is whether this Court should overrule the trial court's factually supported decision. The majority disregards the trial court's findings because it both misconstrues the facts and ignores the proper standard of review. It therefore undermines Rule 9(j) and Rule 702 by ignoring the requirement that testimony against specialists must come from like specialists, and instead effectively says "any doctor will do." Because the trial court correctly granted the motion to dismiss, its decision should be upheld. I respectfully dissent.

The General Assembly enacted Rule 9(j) to establish trial courts as gatekeepers in medical malpractice actions. Rule 9(j) provides that any medical malpractice action "shall be dismissed unless" the plaintiff's medical records and care "have been reviewed by a person" who is (1) "reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence," and (2) "willing to testify that the medical care did not comply with the applicable standard of care." N.C.G.S. § 1A-1, Rule 9(j)(1). The General Assembly passed these requirements to ensure that experts in medical malpractice actions would be "qualified practitioners of a competence similar to those of the practitioners who are the object of the suit." Minutes, *Meeting on H. 636 & H. 730 Before the House Select Comm. on Tort Reform*, 1995 Reg. Sess. (Apr. 19, 1995).

Rule 9(j) thus requires courts to consider whether a witness is reasonably expected to qualify to testify under Rule 702. Rule 702 allows expert testimony only if the witness has specialized knowledge through experience or other training, and: (1) the testimony is based on sufficient facts or data, (2) the testimony is the product or reliable principles and methods, and (3) the witness has applied those principles

and methods reliably to the facts of the case. For medical malpractice actions specifically, Rule 702 explains that if the defendant is a specialist, "a person *shall not give expert testimony* [against the defendant] on the appropriate standard of health care" unless the prospective witness "[s]pecialize[s] in the *same specialty* as the [defendant]; or [s]pecialize[s] in a similar specialty which includes within its specialty *the performance of the procedure that is the subject of the complaint* and ha[s] prior experience treating similar patients." N.C.G.S. § 8C-1, Rule 702(b)(1)(a), (b) (2019) (emphases added).

Thus, for a plaintiff to satisfy Rule 9(j), at the time she filed her complaint she must have retained a witness willing and competent to testify as to the specific specialized procedures involved in the defendant's medical care. By requiring such a showing, "[t]he legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint." *Thigpen v. Ngo*, 355 N.C. 198, 203–04, 558 S.E.2d 162, 166 (2002).

This Court, in *Moore*, described how courts should address motions to dismiss under Rule 9(j). It first spoke to the role of trial courts. In determining whether a claim complies with Rule 9(j), this Court said, "the trial court must look to all the facts and circumstances that were known or should have been known by the [plaintiff] at the time of filing." 366 N.C. at 32, 726 S.E.2d at 818. The trial court can consider evidence outside of the plaintiff's affidavit, including evidence which comes to light after the affidavit is filed. *Id.* at 31, 726 S.E.2d at 817. This Court explained that if "there are *reasonable* disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage of determining whether the party *reasonably expected* the expert witness to qualify under Rule 702." *Id.* at 32, 726 S.E.2d at 818. Though only in the "rare case" will "the trial court determine[ ] that reliance on disputed or ambiguous forecasted evidence was not reasonable," in such a case "the court must make written findings of fact . . . ." *Id.* at 32, 726 S.E.2d at 818. *Moore* thus recognized the unique capacity of the trial court as factfinder, directing that court to weigh reasonably disputed evidence in favor of the nonmoving party, but recognizing the trial court may determine in some cases that reliance on disputed or ambiguous forecasted evidence is unreasonable.

Moore then explained the distinct role of appellate courts on appeal of a trial court's Rule 9(j) dismissal. First, an appellate court must determine whether the trial court's factual findings are supported by

"competent evidence." *Id.* at 32, 726 S.E.2d at 818. Second, if the factual findings are supported by competent evidence, the appellate court must determine whether the findings support the trial court's conclusion that the complaint failed to comply with Rule 9(j). *Id.* Thus, though *Moore* requires *trial courts* to construe reasonably disputed evidence in the plaintiff's favor, it directs appellate courts to uphold trial courts' dismissals under a deferential standard—when competent evidence can be found to support the decision.

This is the second of two lawsuits filed by plaintiff.[1] The current action was filed against Dr. Movahed, Dr. Joshi, and the hospital. Doctor Movahed is a board-certified nuclear cardiologist, the head of his department, and an instructor of nuclear cardiology fellows. Doctor Joshi was a clinical cardiologist seeking to become board certified in nuclear cardiology and therefore was working as a fellow under Dr. Movahed. The defendants moved to dismiss the claims for failure to comply with Rule 9(j). In response to the motion, plaintiff argued that Dr. Toporoff was qualified and willing to criticize Dr. Movahed at the time the lawsuit was filed.

With this background, the trial court dismissed plaintiff's complaints against all the defendants for noncompliance with Rule 9(j). Regarding Dr. Movahed, it found the following: that "Dr. Toporoff admitted that he is not a nuclear cardiologist, and has never interpreted nuclear stress tests"; that "Dr. Toporoff also testified that he had no business criticizing and did not feel competent criticizing Dr. Movahed's interpretation of the [nuclear stress test]"; and that "Dr. Toporoff only agreed to testify in the [lawsuit against Dr. Movahed] if Plaintiff's counsel retained a nuclear cardiologist." The court thus concluded as a matter of law that plaintiff's complaint failed to comply with Rule 9(j) because at the time of filing the lawsuit plaintiff had no expert competent and willing to testify against the defendants.[2]

The Court of Appeals agreed with the trial court, reaching only the issue of Dr. Toporoff's willingness to testify. It properly performed its appellate role as set out in *Moore*, holding that the trial court's finding that Dr. Toporoff was not willing to testify against Dr. Movahed at the time the complaint was filed was supported by competent evidence. *Preston v. Movahed*, 825 S.E.2d 657, 665 (N.C. Ct. App. Mar. 5, 2019).

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1. The first action was filed against several hospital defendants and the hospitalists, including Dr. Prodduturvar and Dr. Doctor.

2. Plaintiff appealed and subsequently settled with the hospital and Dr. Joshi, leaving only the action against Dr. Movahed.

Applying the standard of review set out by *Moore*, this Court should affirm the trial court's dismissal of plaintiff's claim for noncompliance with Rule 9(j). The evidence in this case shows that at the time the complaint was filed, plaintiff could not have reasonably expected Dr. Toporoff to qualify to testify against Dr. Movahed regarding either the interpretation of the nuclear stress or the communication of the test results, and that Dr. Toporoff was not willing to do so.

Doctor Toporoff was neither able nor willing to testify regarding Dr. Movahed's interpretation of the nuclear stress test as a whole. Doctor Toporoff's testimony shows that he is not a nuclear cardiologist like Dr. Movahed, that he understood that Dr. Movahed's only role in the case was to interpret the decedent's nuclear stress test, that he does not interpret nuclear cardiology images like those generated by the nuclear stress test, and that he does not feel competent to do so. Doctor Toporoff explained that before the action was filed, he likely told plaintiff that he would not comment on the nuclear stress test images but would only comment on the "review of the summary" of Dr. Movahed's report, as well as Dr. Movahed's communication of that report. He then explained that he told plaintiff he would not testify against Dr. Movahed at all unless plaintiff also retained a nuclear cardiologist to interpret the nuclear stress test images. Indeed, he admitted that he "ha[d] no business criticizing [Dr. Movahed's] summaries" of nuclear stress test images.

Rule 702(b)(2)(a) specifically requires an expert witness to have the same or substantially the same specialty as the defendant against whom the witness intends to testify. Doctor Movahed's role was limited to the interpretation of the nuclear stress test, a role that includes interpreting nuclear stress test images, which Dr. Toporoff admitted he cannot do. Doctor Toporoff also admitted that he is not, and never has been, a nuclear cardiologist. Clearly plaintiff should have been aware that a clinical cardiologist like Dr. Toporoff would not qualify to testify against a nuclear cardiologist regarding a nuclear stress test that only a nuclear cardiologist is able to interpret. Understanding Dr. Toporoff's limitations and his express concerns, plaintiff did eventually identify two nuclear cardiologists willing to serve as expert witnesses. But neither of them had reviewed the medical care at issue at the time of the filing of the complaint against Dr. Movahed. Plaintiff therefore should have been aware at time of filing that a nuclear cardiologist would be required to testify against another nuclear cardiologist whose involvement was limited to the interpretation of the nuclear stress test. However, at the time the complaint was filed, plaintiff did not have a nuclear cardiologist willing to testify.

Plaintiff nevertheless argues that, despite the unified nature of reading a nuclear stress test, the interpretation of the test can be broken into its component parts and criticized piecemeal. Thus, plaintiff asserts that a nuclear cardiologist is not necessary to criticize the care of another nuclear cardiologist. This approach is exactly what Rule 9(j) and Rule 702 are intended to prevent. It violates the plain language of Rule 702 which requires a specialist with the same subspecialty who is familiar with the procedure. Whether a test conducted by a specialist can be broken into component parts and criticized in this manner itself requires an expert in that field rendering that opinion. It is not something that a court can simply find without expert testimony.

Specifically, plaintiff contends that Dr. Toporoff was willing and qualified to testify as to the EKG portion of the treadmill test. A clinical cardiologist, however, is not qualified to criticize how a nuclear cardiologist should utilize an EKG in isolation from the nuclear images. The majority concedes that Dr. Movahed's involvement in this case was limited to the interpretation of the nuclear stress test only. And, as Dr. Toporoff concedes, the nuclear stress test involves reading together both the treadmill EKG and the nuclear imaging. Therefore, a complete interpretation of a nuclear stress test requires an understanding of the integration of both of these components. If Dr. Toporoff could not testify regarding an essential component of that test, the nuclear images, plaintiff could not reasonably believe his testimony would likely "assist the trier of fact to understand the evidence or to determine a fact in issue" as Rule 702 requires. *See* N.C.G.S. § 8C-1, Rule 702(a). Of course, Dr. Toporoff's own testimony supports this conclusion, as he said he would not feel comfortable testifying even about the EKG portion of the test unless plaintiff retained an expert to testify to the nuclear imaging portion as well. Doctor Toporoff's reluctance to testify on this point goes hand in hand with the unlikelihood of his qualifying to do so; he did not want to testify against Dr. Movahed unless a nuclear cardiologist did as well because, in Dr. Toporoff's words, "I did not want to get into an across-the-table where [Dr. Movahed] is highly competent in that field on paper and I have no business criticizing his summaries."

Finally, Dr. Toporoff was not in a position to testify regarding Dr. Movahed's communication of the nuclear stress test results. For nuclear stress tests, typically the primary care doctor is the one who orders the test, and only does so once he or she rules out acute coronary artery syndrome. The nuclear cardiologist is not present when the nuclear stress test is conducted. The nuclear cardiologist's only role is to later interpret the results of the nuclear stress test, which, as Dr. Movahed

has explained, involves "just sitting in a dark room reading the nuclear." Once he has interpreted the nuclear stress test, which Dr. Toporoff cannot do, the results are communicated to the hospitalist. In this case, consistent with the school's protocol for teaching physicians, he communicated the results of the nuclear stress test to Dr. Joshi while he instructed him on how to interpret the nuclear stress test images. The standard practice, Dr. Movahed explained, is that, as part of the nuclear cardiology training, the fellow communicates the test results to the hospitalist—the physician in charge of the patient. The hospitalist sets up any additional visits and testing with the patient. Doctor Movahed testified that when he communicates his results to the fellow, he typically recommends that, in cases of an abnormality like the decedent's, a CTA be conducted on the patient immediately after discharge from the hospital.

Doctor Toporoff admitted that he is not critical of the role of Dr. Joshi. Thus, if Dr. Toporoff is critical of the method of communication, he is critical of the communication protocol, not of Dr. Movahed. Plaintiff, however, has not put forth evidence that Dr. Toporoff is competent to testify about a nuclear cardiologist's communication protocol in this teaching hospital. Doctor Toporoff has no special knowledge about whether nuclear stress test results should be communicated to a nuclear cardiology fellow, to the hospitalist, or to someone else. It is not enough simply to state that Dr. Toporoff is a cardiologist. At the very least, plaintiff must provide a witness who is familiar with proper communication protocols for nuclear cardiologists operating in the role of teaching physician; and plaintiff did not do so.

Competent evidence thus supports the trial court's conclusion that plaintiff had provided no witness willing to testify against Dr. Movahed and reasonably expected to qualify to do so. Doctor Toporoff, as a clinical cardiologist, was in no place to criticize Dr. Movahed's interpretation of the nuclear stress test or Dr. Movahed's communication of that interpretation. Doctor Movahed is well-versed in a narrow specialty in which Dr. Toporoff does not have experience. Testimony from such a person is of the exact sort the General Assembly hoped to screen out when it enacted Rule 9(j).

The majority goes astray from the very foundation of its analysis because it upends the standard of review this Court established in *Moore*. Its approach places the appellate court into the role of the trial court. If this Court in *Moore* intended the appellate court to review de novo the trial court's dismissal, it would have said so. Indeed, if the majority were right that appellate courts can simply find their own facts to overrule

trial courts' Rule 9(j) decisions, that begs the question of why this Court in *Moore* required trial courts to make factual findings and conclusions of law at all. The appellate courts would only need a trial court record to review.

Instead, *Moore* instructed appellate courts to operate under a deferential standard. It said that in the rare case in which the plaintiff's reliance on disputed or ambiguous evidence was unreasonable, "the [trial] court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination." 366 N.C. at 32, 726 S.E.2d at 818. *Moore*'s approach comports with the underlying intent of Rule 9(j) to screen frivolous and unsupported medical malpractice suits. The rule cannot meaningfully accomplish this purpose unless trial courts may weigh the facts to determine whether the two central requirements of the rule are satisfied.

By upending the *Moore* standard, the majority removes the trial court from its gatekeeping function, reassigning that role to the appellate court, finding its own facts and ignoring the findings and conclusions of the court most suited to make such determinations. Under the proper standard of review, the evidence in this case supports the trial court's findings of fact that in turn support its conclusion that at the time the action was filed, Dr. Toporoff was neither willing to testify against Dr. Movahed nor reasonably expected to qualify to do so.

I respectfully dissent.

RAILROAD FRICTION PRODUCTS CORPORATION
v.
NORTH CAROLINA DEPARTMENT OF REVENUE

No. 278A19

Filed 3 April 2020

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order on petitioner's petition for judicial review entered on 21 February 2019 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 10 March 2020.

Parker Poe Adams & Bernstein LLP, by Kay Miller Hobart, for petitioner-appellant.

Joshua H. Stein, Attorney General, by Matthew W. Sawchak, Solicitor General, Ryan Y. Park, Deputy Solicitor General, Perry J. Pelaez, Special Deputy Attorney General, and Nicholas S. Brod, Assistant Solicitor General, for respondent-appellee.

PER CURIAM.

AFFIRMED.

STATE v. CONLEY

[374 N.C. 209 (2020)]

STATE OF NORTH CAROLINA
v.
ADAM WARREN CONLEY

No. 75PA19

Filed 3 April 2020

Firearms and Other Weapons—possession on school property—multiple weapons—one offense

The Court of Appeals correctly reversed five judgments for possession of firearms on school property and remanded for resentencing where defendant was arrested and charged after one incident on school grounds during which he was in possession of five firearms. Because N.C.G.S. § 14-269.2(b) was ambiguous as to whether multiple convictions were permitted for the simultaneous possession of more than one firearm on a single occasion, under the rule of lenity defendant could be convicted lawfully on only one count.

Justice MORGAN dissenting.

Justice NEWBY joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals, 825 S.E.2d 10 (N.C. Ct. App. 2019), reversing judgments entered on 16 August 2017 by Judge Robert T. Sumner in Superior Court, Macon County, and remanding for resentencing. Heard in the Supreme Court on 8 January 2020.

Joshua H. Stein, *Attorney General*, *by John R. Green Jr.*, *Special Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Emily Holmes Davis*, *Assistant Appellate Defender*, *for defendant-appellee.*

DAVIS, Justice.

Subsection 14-269.2(b) of the North Carolina General Statutes prohibits the possession of firearms on school property. In the present case, defendant Adam Warren Conley was convicted and sentenced on five separate counts for violation of the statute based on an incident in which he was discovered on the grounds of a school in possession of five guns.

Based on our determination that N.C.G.S. § 14-269.2(b) is ambiguous as to whether multiple convictions are permitted for the simultaneous possession of more than one firearm on a single occasion, we conclude that—under the rule of lenity—defendant could only lawfully be convicted on one count. Accordingly, we affirm the decision of the Court of Appeals.

Factual and Procedural Background

On 4 June 2015, a couple who lived on Union School Road in Macon County called the police after hearing several gunshots around 4:40 a.m. and observing two unknown persons walking in their front yard. At approximately 5:15 a.m., Alice Bradley, a school bus driver, was conducting a morning safety check at nearby South Macon Elementary School when she noticed two individuals in the parking lot. The two individuals were later identified as defendant and Kathryn Jeter.

Bradley testified that as she was getting into her car, defendant held up a silver firearm and pointed it at her. The two individuals then began running toward her car. In response, Bradley drove her vehicle in their direction and swerved around them. Defendant and Jeter began walking toward an athletic field behind the school building. When she returned to her bus to radio for help, Bradley noticed that a black bag had been placed on the front seat of the bus.

Deputy Audrey Parrish of the Macon County Sheriff's Office responded to the initial call and began to search for defendant and Jeter on the school grounds. She located the two individuals walking near a fence by an athletic field behind the school and noticed that they were approaching the school building. Deputy Parrish identified herself as a law enforcement officer and ordered defendant and Jeter to stop walking and turn around. Defendant turned toward Deputy Parrish, raised the silver pistol, and pointed it at her. Deputy Parrish heard defendant pull the trigger, but the gun did not fire. At that point, she fled to her car.

Additional law enforcement officers arrived around 5:30 a.m. After a struggle, during which officers had to employ a Taser three times, defendant was taken into custody. As he was being detained, officers observed a silver handgun fall from defendant's waistband to the ground. Officers recovered several other firearms and knives from defendant's person. Ultimately, four firearms and two hunting knives were recovered at the scene. During a subsequent search of the school grounds, law enforcement officers discovered that the black bag that had been placed on Bradley's school bus belonged to defendant and contained an additional .22 caliber pistol.

On 29 June 2015, defendant was indicted by the Macon County grand jury on eleven charges: attempted murder, discharge of a firearm on educational property, assault by pointing a gun, cruelty to animals, possession of a knife on educational property, possession of a firearm in violation of a domestic violence protective order, and five counts of possession of a firearm on educational property.

Defendant was convicted by a jury of one count of attempted first-degree murder, five counts of possession of a gun on educational property, one count of possession of a knife on educational property, one count of cruelty to animals, and one count of assault by pointing a gun. Defendant was sentenced to three consecutive terms of imprisonment: (1) 170 to 216 months for the attempted first-degree murder conviction; (2) a consolidated term of six to seventeen months for three convictions of possession of a firearm on educational property; and (3) a consolidated term of six to seventeen months, suspended for 24 months of probation, for all remaining convictions. Defendant filed an untimely notice of appeal on 31 August 2017. On 27 March 2018, he filed a petition for writ of certiorari with the Court of Appeals, requesting that the court review his convictions despite the fact that his notice of appeal was not timely filed. The Court of Appeals allowed his petition on 19 February 2019.

Before the Court of Appeals, defendant argued, *inter alia*, that the trial court erred by entering judgment on five separate counts of possession of a firearm on educational property, contending that N.C.G.S. § 14-269.2(b) did not clearly authorize the court to enter judgment on multiple counts for the simultaneous possession of more than one firearm. In a unanimous decision, the Court of Appeals held that N.C.G.S. § 14-269.2(b) "is ambiguous as to whether multiple punishments for the simultaneous possession of multiple firearms is authorized." *State v. Conley*, 825 S.E.2d 10, 15 (N.C. Ct. App. 2019). Applying the rule of lenity, the Court of Appeals determined that the statute should be construed as permitting only a single conviction. *Id.* at 14–15. For that reason, the Court of Appeals reversed the judgments and remanded the case to the trial court for resentencing. *Id.* at 15.

The State filed a petition for discretionary review with this Court on 25 March 2019. We allowed the petition on 14 August 2019.

Analysis

The sole issue before us is whether a defendant can lawfully be convicted of more than one count of possession of a firearm on educational

property based on his simultaneous possession of multiple firearms.[1] Subsection 14-269.2(b) of the General Statutes provides as follows:

> It shall be a Class I felony for any person knowingly to possess or carry, whether openly or concealed, *any* gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school.

N.C.G.S. § 14-269.2(b) (2019) (emphasis added). The crux of the dispute in this appeal centers around the use of the phrase "any gun" in the statute—namely, whether the statute's prohibition of possessing or carrying "any gun" on educational property means that separate punishments may be imposed for each gun possessed on a specific occasion or, alternatively, that only a single punishment may be imposed, regardless of the number of guns possessed.

This Court has not previously had occasion to determine this precise issue. The Court of Appeals, however, addressed a similar issue in *State v. Garris*, 191 N.C. App. 276, 663 S.E.2d 340 (2008), which was relied on by the Court of Appeals in reaching its result in the present case.

In *Garris*, the defendant was convicted of two counts of possession of a firearm by a felon after two firearms were simultaneously found on his person. *Id.* at 285, 663 S.E.2d at 348. The relevant statute provided that it was unlawful for any felon to possess "any firearm or any weapon of mass death and destruction." N.C.G.S. § 14-415.1(a) (2007). The Court of Appeals determined that the legislature's use of the phrase "any firearm" was ambiguous because "it could be construed as referring to a single firearm or multiple firearms." *Garris*, 191 N.C. App. at 283, 663 S.E.2d at 346. Thus, the court explained that it was "unclear whether a defendant may be convicted for each firearm he possesses if he possesses multiple firearms simultaneously." *Id.* Noting that "[t]he rule of lenity 'forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention[,]' " *id.* at 284, 663 S.E.2d at 347 (quoting *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (1985)), the court in *Garris* concluded that the defendant could be "sentenced only once for possession of a firearm by a felon based on his simultaneous possession of both firearms." *Garris*, 191 N.C. App. at 285, 663 S.E.2d at 348.

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1. Defendant has not challenged the validity of his remaining convictions.

In the present case, based upon our thorough review of the language of N.C.G.S. § 14-269.2(b) and guided by our prior case law, we conclude that the result reached by the Court of Appeals was correct. We believe this conclusion is mandated by our decision in *State v. Smith*, 323 N.C. 439, 373 S.E.2d 435 (1988), in which we engaged in an analogous exercise of statutory interpretation with regard to a statute structurally similar to the one at issue here.

In *Smith*, the defendant, a bookstore clerk, was arrested for selling two obscene magazines and one obscene film to an undercover officer. *Id.* at 440, 373 S.E.2d at 436. The defendant was convicted of three separate violations of N.C.G.S. § 14-190.1(a), which made it unlawful to "sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene." *Id.* at 440–41, 373 S.E.2d at 436 (quoting N.C.G.S. § 14-190.1(a)(1) (1986)). The defendant argued that he could not lawfully be punished for three separate counts of the offense because the statute was ambiguous as to "the allowable unit of prosecution" when multiple obscene items are sold in a single transaction. *Id.* at 441, 373 S.E.2d at 437.

This Court agreed with the defendant's argument, reasoning that because the statute made "no differentiation of offenses based upon the quantity of the obscene items disseminated," an ambiguity existed as to whether the legislature intended to punish a defendant for the dissemination of "each obscene item" or, instead, "intended that a single penalty attach to the unlawful conduct of disseminating obscenity." *Id.* at 441, 373 S.E.2d at 436. Due to the statute's failure to clearly express the General Assembly's intent as to the allowable unit of prosecution, we determined that this ambiguity should be resolved in favor of lenity toward the defendant. *Id.* at 441, 373 S.E.2d at 437.

In so holding, we cited with approval the rule articulated by the United States Supreme Court providing that "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." *Id.* at 442, 373 S.E.2d at 437 (quoting *Bell v. United States*, 349 U.S. 81, 83–84, 99 L. Ed. 905, 910–11 (1955)). We further stated that our result was "in accord with the general rule in North Carolina that statutes creating criminal offenses must be strictly construed against the State." *Smith*, 323 N.C. at 444, 373 S.E.2d at 438. Accordingly, because the defendant sold the three prohibited items in a single transaction, we concluded that "a single sale in contravention of G.S. § 14-190.1 does not spawn multiple indictments" and, therefore, the defendant could be convicted of only one count of violating the statute. *Id.*

Although the facts in *Smith* are distinguishable from those of the present case and the convictions there arose under a different statute than the one presently before us, we are nevertheless compelled to apply the same legal principles that we applied in *Smith* in interpreting N.C.G.S. § 14-269.2(b). Because it is clear that N.C.G.S. § 14-269.2(b) shares a parallel structure with the statute at issue in *Smith*, our rationale for applying the rule of lenity in that case applies equally here.

The statute in *Smith* prohibited the dissemination of "*any* obscene writing, picture, record or other representation or embodiment of the obscene." *Smith*, 323 N.C. at 440–41, 373 S.E.2d at 436 (emphasis added) (quoting N.C.G.S. § 14-190.1). Subsection 14-269.2(b) prohibits the possession of "*any* gun, rifle, pistol, or other firearm" on educational property. N.C.G.S. § 14-269.2(b) (emphasis added). Thus, the statutes at issue in both cases contain the word "any" followed by a list of singular nouns in order to enumerate the prohibited items. In both statutes, this grammatical structure could reasonably be construed as referring *either* to a single item or to multiple items.[2] Accordingly, we similarly conclude that the statutory language here is ambiguous as to "the allowable unit of prosecution." *Smith*, 323 N.C. at 441, 373 S.E.2d at 437. Thus, defendant can be convicted of only one violation of N.C.G.S. § 14-269.2(b).

While the State attempts to explain why *Smith* should not control on these facts, we find the State's arguments to be unpersuasive. The State first contends that the legislature's use of the word "any" in N.C.G.S. § 14-269.2(b) is merely intended to encompass the numerous *types* of firearms in existence—making clear that a person cannot possess a firearm on educational property regardless of whether the firearm is a pistol, rifle, shotgun, machine gun, or other type of gun. But the same argument could have been made in *Smith*—that is, the argument that the term "any" in the statutory phrase "any obscene writing, picture, record or other representation or embodiment of the obscene" was intended to cover all obscene materials regardless of the form they took.

Moreover, the State's argument is further refuted by the fact that the phrase "or other firearm of any kind" in N.C.G.S. § 14-269.2(b) already

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2. As the Supreme Court of Alabama has noted, in order to discern the legislature's intent as to the intended unit of prosecution, courts often focus on whether a statute uses the word "any" or the words "a" or "another" to describe the prohibited item. *McKinney v. State*, 511 So. 2d 220, 224–25 (Ala. 1987) (citation omitted). The court elaborated on this point as follows: "How, then, should the unit of prosecution be described so that an intent to allow multiple convictions is clear and unequivocal? Instead of using the word 'any' to describe the unit of prosecution, the singular words 'a' or 'another' should be used." *Id.* at 224 (citation omitted).

conveys the meaning that all types of firearms are encompassed by the statute. Therefore, under the State's argument, the General Assembly's use of either the word "any" or the phrase "or other firearm of any kind" would be merely an act of redundancy. It is a well-established rule of statutory construction that a statute "must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature . . . did not intend any provision to be mere surplusage." *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) (citations omitted).

Second, the State contends that *Smith* is distinguishable from this case because the statute at issue there dealt with the dissemination, as opposed to the possession, of the enumerated items. However, the fact that N.C.G.S. § 14-190.1(a)(1) concerned the dissemination—rather than the possession—of prohibited items is a distinction without a difference. Our ruling in *Smith* was predicated on the ambiguity of the language contained in the above-referenced portion of the statute rather than on any substantive distinction between the act of disseminating and the act of possessing. An act of possession, like an act of dissemination, may involve either one or multiple items. Just as the obscenity statute in *Smith* "ma[de] no differentiation of offenses based upon the quantity of the obscene items disseminated," *Smith*, 323 N.C. at 441, 373 S.E.2d at 436, subsection 14-269.2(b) likewise makes no differentiation of offenses based on the quantity of firearms possessed.

Third, the State asserts that unlike the relatively modest increase in the amount of harm caused by the dissemination of each additional obscene item in *Smith*, defendant's possession of each additional firearm on school property represents a separate and discrete potential for violence. The State argues that the General Assembly could not have intended that a person who brings five firearms onto school property would receive no greater punishment than an individual who brings only one.

We disagree. Indeed, the question of whether to impose one or multiple punishments under N.C.G.S. § 14-269.2(b) in this context is a quintessential example of a policy decision reserved for a legislative body. Our recognition of the serious danger resulting from the presence of guns on school property does not allow us to usurp the General Assembly's authority to make such policy decisions. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) ("The General Assembly is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws."). Once

such a policy decision has been made by the General Assembly and codified by statute, it is the duty of the courts to give meaning to the legislature's clearly stated intent. However, we are unable to discern such an unambiguous expression of intent based on our reading of N.C.G.S. § 14-269.2(b) in its present form.

The dissent asserts that N.C.G.S. § 14-269.2(b) is a unique statute because it transforms what might otherwise be a lawful act—the possession of a firearm—into an unlawful one based solely upon the location where the possession occurs. The dissent takes this as proof that the legislature intended for possession of a gun on school property to generate a heightened degree of concern, thereby rendering this statute deserving of special treatment. The dissent also believes that this location-focused nature of the criminal prohibition on firearms on school property makes N.C.G.S. § 14-269.2(b) distinguishable from the statutes at issue in *Smith* and *Garris*, given that the statutes in those two cases merely imposed generalized bans on possession or dissemination of certain items that applied in any location.

However, the dissent does not explain *why* the location-based nature of the criminal prohibition in N.C.G.S. § 14-269.2(b) renders it materially distinguishable from the obscenity statute at issue in *Smith* for purposes of the rule of lenity's applicability. It is certainly true that the two statutes might have different aims, each seeking to address a distinct type of criminal conduct. But this does not change the key fact that both statutes share the same core ambiguity in that neither one clearly indicates the intended allowable unit of prosecution.

Statutory language is either ambiguous or it is not. Moreover, language that is ambiguous in one statute does not magically shed its ambiguity when used in a second statute just because the evil sought to be addressed in the latter law is deemed to be of greater public concern than that addressed by the former one. We are not permitted to disregard the rule of lenity simply because its application in a particular case may be perceived as inconvenient.

The dissent contends that our analysis neglects the spirit of the law and what it believes was the likely result that the legislature sought to accomplish. But the dissent's subjective belief as to the legislature's intent does not change the fact that there are two reasonable constructions of N.C.G.S. § 14-269.2(b) with regard to the intended allowable unit of prosecution. As a result, this is precisely the type of scenario for which the rule of lenity exists. The statutory language at issue in N.C.G.S. § 14-269.2(b) is ambiguous for the very same reason that the analogous

language in the obscenity statute in *Smith* was held to be ambiguous by this Court. Unless we were to overrule *Smith*—a result that the dissent does not advocate—adherence to our prior decision mandates that we reach the same result here.

Smith stands for the proposition that a statute possessing this same type of structure—i.e., employing the word "any" followed by a list of singular nouns to enumerate the prohibited items—is ambiguous as to the allowable unit of prosecution. Accordingly, we are bound by *Smith* to conclude that this ambiguity triggers the rule of lenity in the present case, and we decline to take the dissent up on its invitation to engage in what would be an act of pure judicial speculation in guessing which interpretation the legislature actually intended.

It is important to emphasize that the General Assembly is, of course, free to amend the language of N.C.G.S. § 14-269.2(b) at any time to allow for multiple punishments when an individual simultaneously possesses more than one firearm on educational property. But any such amendment must unambiguously state a legislative intent to accomplish this result. Given the existing ambiguity in N.C.G.S. § 14-269.2(b), we are required by our prior decision in *Smith* to invoke the rule of lenity and to hold that defendant may be convicted of only a single violation of this statute.[3]

Conclusion

For the reasons stated above, we affirm the decision of the Court of Appeals.

AFFIRMED.

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3. We note that our decision today is consistent with several cases from other jurisdictions similarly holding that multiple punishments are not permitted for a single instance of unlawful possession in violation of a statute that uses the term "any" to describe the items to be prohibited. *See, e.g.*, *United States v. Dunford*, 148 F.3d 385, 390 (4th Cir. 1998) (construing a federal statute prohibiting the possession of "any firearm" by a felon to mean that the defendant's "possession of [ ] six firearms and ammunition, seized at the same time from his house, supports only one conviction"); *State v. Watts*, 462 So. 2d 813, 814–15 (Fla. 1985) (holding that a Florida statute prohibiting inmates from possessing "[a]ny firearm or weapon" on prison grounds permitted a defendant who possessed two knives to be convicted of only one count of the offense).

Justice MORGAN dissenting.

I respectfully dissent from my esteemed colleagues in the majority who, in my view, have mistakenly considered our decision in *State v. Smith*, 323 N.C. 439, 373 S.E.2d 435 (1988) to be controlling authority in the present case. As a result, I am of the opinion that the majority has ignored the presence of clear legislative intent in subsection 14-269.2(b) of the North Carolina General Statutes, misapplied the rule of lenity, and, consequently, reached the unfortunate conclusion that a person who violates the statute by carrying multiple firearms on educational property is subject to only a single conviction for such criminal activity. In my view, such a person presents a significant threat to the sanctity of educational property which is so abhorrent in its potentiality that the imposition of multiple punishments for the offense should be available as warranted. Although the majority finds ambiguity in the plain language of N.C.G.S. § 14-269.2(b), which would inure to the benefit of its violator regarding the administration of punishment for an offense under this law, I would instead hold that N.C.G.S. § 14-269.2(b) permits multiple convictions to be entered against defendant under the facts of this case, wherein defendant carried several firearms on his person and carried a separate firearm that was placed on a school bus. Therefore, I would reverse the decision of the Court of Appeals and reinstate the judgment of the trial court.

"Legislative intent controls the meaning of a statute." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998) (citation omitted). "To determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." *Id.* As this Court explained in *State v. Earnhardt*,

> [w]here [a statute] is clearly worded, so that it is free from ambiguity, the letter of it is not to be disregarded in favor of a mere presumption as to what policy was intended to be declared . . . *But where it admits of more than one construction, or is doubtful of meaning, uncertain, or ambiguous, it is not to be construed only by its exact language, but by its apparent general purpose; that meaning being adopted which will best serve to execute the design and purpose of the act.*

170 N.C. 725, 86 S.E.2d 960, 961 (1915) (emphasis added) (citations omitted). While it is true that a statute creating a criminal offense "must be strictly construed against the State[,]" *Smith*, 323 N.C. at 444, 373 S.E.2d

at 438, "[t]he statute . . . should be construed sensibly, and, in order to make sure of the true intent, the meaning of [the] words or phrases may be extended or narrowed or additional terms implied, or it may be presumed that the [l]egislature intended exceptions to its language, where this is necessary to be done in order to enforce the evident purpose" of the statute. *Earnhardt*, 170 N.C. at 725, 86 S.E.2d at 961. Moreover, "if a literal interpretation of a word or phrase's plain meaning [in a statute] will lead to absurd results, or contravene the manifest purpose of the legislature, as otherwise expressed, *the reason and the purpose of the law shall control*." *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018) (emphasis added).

N.C.G.S. § 14-269.2(b) reads, in pertinent part: "It shall be a Class I felony for any person knowingly to possess or carry, whether openly or concealed, *any gun*, rifle, pistol, *or other firearm* of any kind on educational property." N.C.G.S. § 14-269.2(b) (2015) (emphasis added). The only element of N.C.G.S. § 14-269.2(b) that would render unlawful an otherwise lawful ability to possess or carry any gun or other firearm is the inability to legally possess or carry it on educational property. Hence, it is clear that the legislature intended that the presence of any gun or other firearm on educational property generate a heightened degree of concern in comparison to a more generalized type of item, and generate a heightened degree of treatment in comparison to a more generalized type of place where a gun or other firearm is possessed or carried. The obvious legislative intent of this focused statutory enactment is to prevent violence in the schools located in North Carolina. An increase in the number of firearms possessed or carried by a person on educational property begets an increase in the dangers faced by those who learn, teach, administrate, work, or are otherwise found in the facilities of these academic institutions or upon their grounds. In its brief, the State's depiction of each firearm possessed or carried on educational property as "a separate, discrete instrument of death" which affords a potential shooter with the means to minimize a need to reload a firearm or the requisite time to replenish its ammunition is a grim observation of the realities of the existence of N.C.G.S. § 14-269.2(b) and the properness of an interpretation of the statute to allow the prospect of multiple convictions for a violation of the law.

The majority, however, finds ambiguity in the phrase "any gun" as utilized in N.C.G.S. §14-269.2(b) and resolves this ambiguity in favor of lenity toward defendant, concluding that the statute does not authorize the entry of multiple convictions for the simultaneous possession of multiple guns on educational property. My esteemed colleagues of

the majority believe that this conclusion is mandated by our decision in *Smith*, a case in which this Court determined that the rule of lenity prevented a defendant from receiving multiple convictions for the dissemination of multiple items of obscenity in one single sales transaction. *See Smith*, 323 N.C. at 440, 373 S.E.2d at 436. In construing N.C.G.S. § 14-190.1, which established that it is unlawful to disseminate "*any* obscene writing, picture, record or other representation or embodiment of the obscene," we found the principle espoused by the United States Supreme Court in *Bell v. United States*, 349 U.S. 81, 99 L. Ed. 2d 905 (1955) to be persuasive. The principle states that "when the legislature does not clearly express legislative intent, . . . any ambiguity should be resolved in favor of lenity." *Smith*, 323 N.C. at 441, 373 S.E.2d at 437 (citing *Bell*, 349 U.S. at 81, 99 L. Ed. 23 at 905). However, despite the specific strictures of N.C.G.S. § 14-269.2(b), the majority in the instant case nonetheless likens this statute to N.C.G.S. § 14-190.1—the dissemination of obscenity statute addressed in *Smith*—to apply the rule of lenity, due to statutory ambiguity in the absence of an express legislative intent. But in *Smith*, the subject matter of the statute concerned obscenity outlawed generally from being disseminated; here, the subject matter of the statute concerns firearms outlawed specifically from being on educational property. In *Smith*, there was no identifiable purpose to punish more severely the dissemination of individual items of obscenity than the dissemination of a group of items of obscenity as to the commission of one offense, because the harm to society was still quantitatively the same; on the other hand, there is an identifiable purpose to punish more severely the act of possessing or carrying individual firearms than a group of firearms as to the commission of one offense, due to the significant threat of danger to human life which is quantitatively increased by the presence of multiple firearms.

The majority also cites the Court of Appeals decision in *State v. Garris*, 191 N.C. App. 276, 663 S.E.2d 340 (2008) as helpful guidance in this case of first impression in our Court. In *Garris*, the lower appellate court determined that the language of N.C.G.S. § 14-415.1, which makes it unlawful for a person who has been convicted of a felony "to . . . have in his custody, care, or control any *firearm* . . . ," was ambiguous as to whether "the statute would allow for multiple convictions for possession if multiple firearms were possessed, even if they were possessed simultaneously." *Smith*, 323 N.C. at 283, 663 S.E.2d at 346 (quoting N.C.G.S. §§ 14-288.8(c), 14-415.1(a) (2007)). The Court of Appeals held that, under the Court's reasoning in *Bell*, the ambiguity should be resolved in favor of lenity so as to allow the defendant felon in *Garris* to be convicted and sentenced only once for possession of a firearm

by a felon based upon his simultaneous possession of multiple firearms "in the absence of a contrary legislative intent." *Id.* at 284, 663 S.E.2d at 347 (citation omitted). The majority analogizes N.C.G.S. § 14-415.1(a) to N.C.G.S. § 14-269.2(b) and hence applies the rule of lenity, due to statutory ambiguity in the absence of contrary legislative intent. But in *Garris*, the subject matter of the statute had application to a firearm possessed by a felon anywhere; here, the subject matter of the statute has application to a firearm carried or possessed specifically on educational property by anyone. Although the majority in the present case cites *Garris* primarily to support its premise that there is an appellate court consistency in these two case outcomes, I submit that the dominant consistency lies in the majority's automatic association of a criminal statute's provision beginning with the term "any" with the majority's propensity to invoke the rule of lenity in such circumstances, which is compounded in the instant case by the majority's express view that there is no evident expression of legislative intent to authorize multiple punishments for multiple firearms being possessed or carried on educational property in violation of N.C.G.S. § 14-269.2(b).

In stretching the tight confines of the present case in order to capture the generalities afforded by N.C.G.S. § 14-190.1 as construed in *Smith* and N.C.G.S. § 14-415.1 as interpreted in *Garris*, the majority conveniently ignores the clear legislative intent that undergirds N.C.G.S. § 14-269.2(b). It also unduly inflates the similarities between and among the legal authorities upon which it relies in order to rationalize its determination that these cited statutes and cases constitute binding precedent, thus misappropriating the rule of lenity. In relying primarily and heavily upon the doctrine, the majority fails to comport with the guidance provided by the United States Supreme Court in *Callanan v. United States*, 364 U.S. 587, 815 S. Ct. 321, 5 L.Ed. 2d 312 (1961) regarding the correct application of the rule of lenity: "The rule [of lenity] comes into operation at the end of the process of construing what [the legislative body] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary." *Id.* at 596, 815 S. Ct. at 326.

The majority notes that "N.C.G.S. § 14-269.2(b) shares a parallel structure to the statute at issue in *Smith*" and is "a structurally similar statute." In its analyses of both *Smith* and *Garris*, which the majority has chosen to serve as precedent for its determination of the instant case, along with the corresponding statutes featured in those appellate cases, it appears that the majority has become so lulled by, and enthralled with, the rhythmic cadence of the structurally similar provisions of N.C.G.S.

§ 14-190.1—"*any* obscene writing . . . ."—and N.C.G.S. § 14-415.1—"*any* firearm"—that the language of N.C.G.S. § 14-269.2(b)—"*any* gun"—is hypnotically viewed through the same lens, even though N.C.G.S. § 14-269.2(b) is more grounded in a specific narrow statutory enactment with clearer legislative intent than the other statutes, which I opine should obviate any perceived statutory ambiguity and eliminate any need to invoke the rule of lenity.

Just as the majority looks to the *Garris* decision of the Court of Appeals to support its determination, I am likewise inclined to cite an opinion, *In re Cowley*, 120 N.C. App. 274, 461 S.E.2d 804 (1995), from our distinguished colleagues of the lower appellate court. In determining in *In re Cowley* that a gun possessed on educational property did not have to be operable in order to violate the "any gun" provision of N.C.G.S. § 14-269.2(b), the Court of Appeals recognized that the General Assembly had already fashioned the statute in such a manner that the court was obliged to take note that "the focus of the statute is the increased necessity for safety in our schools." *Id.* at 276, 461 S.E.2d at 806. In expressly distinguishing N.C.G.S. § 14-269.2(b) from other criminal offense statutes pertaining to firearms such as the offense of possession of a firearm by a felon embodied in N.C.G.S. § 14-415.1(a) and the offense of armed robbery found in N.C.G.S. § 14-87, the unanimous panel of the Court of Appeals in *In re Cowley* expressly noted:

> "Public policy favors that [N.C.G.S.] § 14-269.2(b) be treated differently from the other firearm statutes. The other statutes are concerned with the increased risk of endangerment, while the purpose of [N.C.G.S.] § 14-269.2(b) is to deter students and others from bringing any type of gun onto school grounds."

Id. at 276, 461, S.E.2d at 806.

The majority's pervasive holding that the Court of Appeals is correct in the current case that N.C.G.S. § 14-269.2(b) "should be construed as only permitting a single conviction" is an unfortunate construction of this statute which was clearly intended by the legislature to protect a community of individuals with inherently minimal defenses in the educational setting. In determining that in any and all circumstances, a criminal defendant can only be convicted by the trial court of a single offense under N.C.G.S. § 14-269.2(b)—regardless of the number of guns, rifles, pistols, or other firearms which are knowingly carried on educational property or to a curricular or extracurricular activity sponsored by a school—the majority has prospectively limited a statutory violation

involving multiple firearms in a school setting to merely one firearm conviction for scenarios about the likes of which I shall not speculate. Even here, defendant's placement of a firearm in a black bag, found on a school bus at an elementary school in the early morning hours of a school day, in addition to the multiple firearms that were found on his person, is sufficient to give pause, in my view, to the ramifications of this case's outcome, especially as it impacts the deterrent effects of N.C.G.S. § 14-269.2(b).

In holding that N.C.G.S. § 14-269.2(b) does not allow for the prospect of multiple convictions for the simultaneous possession of multiple guns on educational property, I am of the opinion that this Court's majority has made a determination that contravenes the statute's manifest purpose and defies the legislature's clear intent to protect a vulnerable population from potential school shootings. In doing so, I respectfully consider the majority to have neglected to analyze N.C.G.S. § 14-269.2(b) as a whole in order to consider the chosen words, the spirit of the law, and the objectives that the statute seeks to accomplish.

For the reasons given, I respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
CHAD CAMERON COPLEY

No. 195A19

Filed 3 April 2020

Criminal Law—prosecutor's closing argument—reasonable fear and race—prejudice analysis

In a first-degree murder trial, the trial court did not err by overruling defendant's objections to the prosecutor's statements during closing argument regarding race and reasonable fear, where defendant asserted he shot the victim through a window in his house in self-defense. Assuming without deciding that the prosecutor's statements were improper, defendant did not demonstrate prejudice, given the totality of the prosecutor's closing argument (which focused extensively on defendant's lack of credibility as a witness) and in light of the overwhelming evidence presented of defendant's guilt of murder by premeditation and deliberation and/or by lying in wait.

Justice EARLS concurring.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 828 S.E.2d 35 (2019), vacating the judgment entered on 23 February 2018 by Judge Michael J. O'Foghludha in Superior Court, Wake County, and remanding for a new trial. Heard in the Supreme Court on 9 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant.

HUDSON, Justice.

Here we must determine whether the Court of Appeals erred by holding that the trial court abused its discretion when it overruled defendant's objections during the prosecutor's closing argument. Because we conclude that the trial court rulings did not constitute prejudicial error, we reverse and remand.

I. Factual and Procedural Background

On 6 August 2016, Jalen Lewis threw a party while his parents were out of town. Lewis lived in Neuse Crossing, a quiet neighborhood in Raleigh with no sidewalks. Defendant lived on the same street, two or three houses down on the same side of the road.

Around midnight, the victim, Kourey Thomas, arrived at Lewis's party with two friends, David Walker and Chris Malone, and parked at the end of the street. Thomas was wearing a red NC State hat and a red shirt.

Some time later, a group of about twenty people arrived at the party. The hosts did not know them and asked them to leave. The group walked uneventfully back to their cars which were parked in front of defendant's house. They stood on the curb discussing where to go next. According to the State's witnesses, no one was being loud or disruptive.

Defendant testified that he was upset from having a bad day. He heard people arguing outside and yelled at them from his window. He yelled, "keep it the f--- down." The group yelled back, "shut the f--- up; f--- you; go inside, white boy." Defendant testified that he saw multiple people in the group with guns. Other witnesses testified that they did not see anyone with a gun at the party. Defendant's two young daughters were in the house.

Defendant called 911. Before the operator answered, defendant was recorded saying "I'm going to kill him." In his testimony, defendant admitted to having falsely reported there were "hoodlums racing up and down the street." He said he was "locked and loaded" and going to "secure the neighborhood." Defendant was not a police officer and there was no neighborhood watch. After the 911 call ended, defendant loaded his gun.

Defendant believed his son was part of the rowdy group outside and went to get him. When he got to his garage, which was furnished like a den, he found his son there. From his garage defendant yelled at the group to "leave the premises."

According to witnesses who were at the scene that night, Kourey Thomas and his friends saw police blue lights from an unrelated traffic stop down the street. Thomas had a weed grinder on his person and did not want any trouble with the police, so he ran from Lewis's house back to his friend's car.[1] He cut across a small part of defendant's yard on the

1. A weed grinder is a hand-held device used to grind cannabis into small bits.

way. Defendant saw a man running in his yard. Thomas was shot before he made it to his car. The force from the shot caused him to fall on the curb next to defendant's mailbox. Someone screamed, "he just shot him through the window!" Defendant's house was dark, his garage was closed, and one of the garage windows was broken. Thomas was African American. Defendant is white.

When Deputy Barry Carroll arrived, he saw a group of ten to fifteen people in the street. He saw broken glass in defendant's driveway from the broken garage door window. When the deputy approached the house, he shined a flashlight into the garage and saw defendant step into the garage from the house. The deputy asked defendant if he shot someone and defendant said he had. The deputy asked where the gun was, and defendant indicated that it was in the house. Defendant let the deputy into his house where the deputy observed a shotgun leaning against a stairwell banister. Defendant indicated that it was the gun he had fired.

Thomas died at the hospital from the gunshot wound. The bullet went through his right arm and entered his right side just below the rib cage.

Defendant was charged with first-degree murder. His case went to trial in February 2018. During closing arguments at trial, the prosecutor made the following statements which are at issue here:

> MR. LATOUR [prosecutor]: I have at every turn attempted to not make this what this case is about. And at every turn, jury selection, arguments, evidence, closing argument, there's been this undercurrent, right? What's the undercurrent? The undercurrent that the defendant brought up to you in his closing argument is what did he mean by hoodlums? I never told you what he meant by hoodlums. I told you he meant the people outside. They presented the evidence that he's scared of these black males. And let's call it what it is. Let's talk about the elephant in the room.
>
> MR. POLK [defense counsel]: Objection.
>
> THE COURT: Overruled.
>
> MR. LATOUR: Let's talk about the elephant in the room. If they want to go there, consider it. And why is it relevant for you? Because we talked about that self-defense issue, right, and reasonable fear. What is a reasonable fear? You get to determine what's reasonable. Ask yourself if Kourey

> Thomas and these people outside were a bunch of young, white males walking around wearing N.C. State hats, is he laying dead bleeding in that yard?
>
> MR. POLK: Objection.
>
> THE COURT: Overruled.
>
> MR. LATOUR: Think about it. I'm not saying that's why he shot him, but it might've been a factor he was considering. You can decide that for yourself. You've heard all the evidence. Is it reasonable that he's afraid of them because they're a black male outside wearing a baseball cap that happens to be red? They want to make it a gang thing. The only evidence in this case about gangs is that nobody knows if anybody was in a gang. That's the evidence. They can paint it however they want to paint it, but you all swore and raised your hand when I asked you in jury selection if you would decide this case based on the evidence that you hear in the case, and that's the evidence. Now, reasonableness and that fear, a fear based out of hatred or a fear based out of race is not a reasonable fear, I would submit to you. That's just hatred. And I'm not saying that's what it is here, but you can consider that. And if that's what you think it was, then maybe it's not a reasonable fear.

The prosecutor continued his closing argument for several more minutes and then the trial judge instructed the jury on the applicable law.

In less than two hours the jury found defendant guilty of first-degree murder by premeditation and deliberation and/or by lying in wait. Defendant appealed his conviction.

Defendant argued that the trial court abused its discretion by failing to sustain his objections to the prosecutor's comments about race during closing argument. The Court of Appeals held that the trial court committed prejudicial error by overruling defendant's objections and by failing to instruct the jury to disregard the prosecutor's comments or to declare a mistrial. The Court of Appeals awarded defendant a new trial. The dissenting judge would have held that the trial court did not abuse its discretion in overruling defendant's objections to the prosecutor's comments in closing argument.

The State now appeals. The issue before us is whether the trial court abused its discretion by overruling defendant's objections to the State's closing argument. We hold that the trial court did not commit prejudicial

error and that the Court of Appeals erred by awarding defendant a new trial.

II. Analysis

"A challenge to the trial court's failure to sustain a defendant's objection to a comment made during the State's closing argument is reviewed for an abuse of discretion . . . ." *State v. Fletcher*, 370 N.C. 313, 320, 807 S.E.2d 528, 534 (2017) (citing *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364, *cert. denied*, 540 U.S. 971, 124 S.Ct. 442, 157 L.Ed. 2d 320 (2003)). "In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling 'could not have been the result of a reasoned decision.' " *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (quoting *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996)).

We conduct a two-part analysis to determine whether the trial court committed prejudicial error in overruling defendant's timely objection to the prosecutor's reference to race during the State's closing argument. *See, e.g.*, *Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534; *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. We " 'first determine if the remarks were improper' and then 'determine if the remarks were of such a magnitude that their inclusion prejudiced [the] defendant.' " *Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534 (quoting *Walters*, 357 N.C. at 101, 588 S.E.2d at 364) (alteration in original). "Assuming that the trial court's refusal to sustain the defendant's objection was erroneous, the defendant must show that there is a reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted." *Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534 (citing *State v. Ratliff*, 341 N.C. 610, 617, 461 S.E.2d 325, 329 (1995)).

Here, we need not conduct the two-part analysis in its entirety. Because we determine that the analysis of prejudice is ultimately dispositive, we focus our attention there. *See State v. Murrell*, 362 N.C. 375, 392, 665 S.E.2d 61, 73 (2008) ("Even assuming, *arguendo*, the impropriety of the prosecutor's reference to Dr. Kramer, defendant has failed to demonstrate prejudice."). *See also State v. Peterson*, 361 N.C. 587, 606–07, 652 S.E.2d 216, 229 (2007) ("Because we assume the argument was improper, we must determine whether the argument prejudiced defendant to the degree that he is entitled to a new trial.").[2] Thus, we

2. In *Peterson*, the State conceded that the Assistant District Attorney's arguments were "excessive and inappropriate." 361 N.C. at 607, 652 S.E.2d at 229. Thus, the Court assumed the statements were improper. *Id.* Here, although the State has not conceded the statements were improper, the prejudice prong is still dispositive.

assume without deciding that the prosecutor's comments about race were improper.

Neither the majority nor the dissenting opinion from the Court of Appeals conducted a complete prejudice analysis. The majority held that the trial court committed prejudicial error by overruling defendant's objections and by failing to instruct the jury to disregard the prosecutor's comments or to declare a mistrial. On that basis, the majority awarded defendant a new trial. The dissenting judge disagreed and would have held that the trial court did not abuse its discretion in overruling defendant's objections to the prosecutor's comments in closing argument; thus, there was no need to address the prejudice issue in the dissent.

The Court of Appeals majority stated the proper standard for review of the closing argument and employed the two-part analysis. However, the prejudice analysis was incomplete. The majority concluded that "[t]he offensive nature of the prosecutor's comments exceeded language that our Supreme Court in *Jones* noted was held to be prejudicial error warranting new trials in past cases." *State v. Copley*, 828 S.E.2d 35, 43 (N.C. Ct. App. 2019).

We conclude that *Jones* did not provide an adequate basis for the Court of Appeals' decision on the prejudice issue. Because the challenged argument in *Jones* took place during the State's closing arguments in the sentencing phase of a death penalty case, we consider it inapposite. In *Jones*, we emphasized:

> in determining prejudice in a capital case, such as the one before us, special attention must be focused on the particular state of the trial. Improper argument at the guilt-innocence phase . . . may not be prejudicial where the evidence of defendant's guilt is virtually uncontested. However, at the sentencing proceeding, a similar argument may in many instances prove prejudicial by its tendency to influence the jury's decision to recommend life imprisonment or death.

355 N.C. at 134, 555 S.E.2d at 108. Here, in the guilt-innocence phase of a non-capital trial, the court must look to the evidence of defendant's guilt as well as to the remainder of the closing argument to determine whether the argument was prejudicial. The context of the argument in *Jones* differs so significantly from the context in which the argument here was made that we conclude it was an improper anchor for the prejudice analysis conducted by the majority below.

The majority below also references the cases we cited in *Jones* as examples of prejudicial closing argument language that we have held warranted new trials in the past. We are not persuaded by the logic of the majority's conclusion that the prosecutor here "exceeded" language we have found to be prejudicial in past cases. The specific language held to have been prejudicial in prior cases does not necessarily define prejudice in the case before us.

We recognize that in *Jones* we did look to language deemed prejudicial in other cases to determine whether the language in *Jones* was prejudicial. In the sentencing phase of a death penalty case, where the jury must determine whether to sentence a defendant to life or death, it may be more appropriate to look to language from other cases. Because the sentencing issues in one capital case may be similar to the sentencing issues in other capital cases, prior determinations of prejudice may be more informative by comparison than they are to the issues here.

However, when analyzing prejudice in the guilt-innocence phase of this trial, we view prejudicial comments from other cases as having less bearing on our prejudice analysis than a comparison with the evidence and context here. Prejudice is not a quantifiable commodity; statements cannot be assigned a number on a scale from which we can determine whether one statement here is more or less prejudicial than one in another case. Rather, the purpose of a prejudice analysis is to determine whether there is a reasonable possibility that the jury would have acquitted defendant had his objection to the State's argument been sustained. It is defendant's burden to show this. *Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534 (citing *Ratliff*, 341 N.C. at 617, 461 S.E.2d at 329).

The Court of Appeals majority below did not analyze whether defendant carried his burden of showing the likelihood that the jury would have reached a different verdict in light of the evidence and other arguments the jury heard. We conclude that the majority's analysis is inadequate to resolve the issue.

In order to determine whether defendant was prejudiced by the prosecutor's language in closing argument, we assess the likely impact of any improper argument in the context of the entire closing. *State v. Thompson*, 359 N.C. 77, 110, 604 S.E.2d 850, 873 (2004) ("[S]tatements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.") (quoting *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046,

115 S.Ct. 642, 130 L.Ed.2d 547 (1994)), *cert. denied*, 546 U.S. 830, 126 S.Ct. 48, 163 L.Ed.2d 80 (2005)).

The primary dispute at trial was over defendant's intent and the validity of his explanation of events on the fateful evening and his statements to investigators thereafter. Defendant himself admitted statement-by-statement on cross-examination that he had not been truthful with investigators. The prosecutor focused on defendant's admitted false statements to investigators in his closing argument. Looking at the closing argument as a whole, the allegedly improper argument was a small part of the prosecutor's much more extensive argument that defendant was not a credible witness, that the State had proven his guilt beyond a reasonable doubt, and that defendant had not acted in self-defense.

We must also look to the evidence presented by the State to determine whether there is a reasonable possibility the jury would have acquitted defendant if the prosecutor's remarks had been excluded. *See State v. Jones*, 355 N.C. at 134, 558 S.E.2d at 108 ("Improper argument at the guilt-innocence phase . . . may not be prejudicial where the evidence of defendant's guilt is virtually uncontested."); *see also State v. Murillo*, 349 N.C. 573, 606, 509 S.E.2d 752, 771 (1998) ("[E]ven assuming *arguendo* that this portion of the argument was improper, it was not prejudicial to defendant in light of the substantial evidence of his guilt.") (citing *State v. Campbell*, 340 N.C. 612, 631, 460 S.E.2d 144, 154 (1995), *cert. denied*, 516 U.S. 1128, 116 S.Ct. 946, 133 L.Ed.2d 871 (1996)).

The trial here extended over two full weeks during which time the jury was selected, listened to testimony from numerous witnesses including defendant himself, and received numerous exhibits. Among the exhibits were photographs of the scene, photographs of the victim's body, and the recording of the defendant's voice on the 911 call.

The State presented the following evidence of first-degree murder by premeditation and deliberation and/or by lying in wait: defendant was recorded saying "I'm going to kill him"; defendant told the 911 operator he was "locked and loaded" and was going to "secure the neighborhood"; defendant loaded his gun and went into his dark, closed garage; Thomas ran through a portion of defendant's yard; Thomas was unarmed, non-threatening, and had no interaction with defendant; defendant fired a shot through the closed garage door; defendant admitted to a deputy that he shot someone and that the gun was his; the shot caused Thomas's death. We conclude all of this was compelling evidence of defendant's guilt of first-degree murder and that the

credibility of defendant's contention to the contrary—i.e. that he acted in self-defense—was substantially impaired.[3]

It is then defendant's burden to show that he was prejudiced by the prosecutor's challenged argument. *Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534 (citing *Ratliff*, 341 N.C. at 617, 461 S.E.2d at 329.). But defendant has failed to provide a persuasive argument that there was a reasonable possibility the jury would have acquitted him in the absence of the prosecutor's comments about race.

Given that the jury found beyond a reasonable doubt that defendant was guilty of first-degree murder based on the evidence it heard, and given defendant's failure to argue persuasively that there is a reasonable possibility that the jury would have acquitted him absent the prosecutor's challenged remarks, we cannot conclude that the inclusion of the remarks prejudiced defendant. Therefore, we are unable to conclude that he is entitled to a new trial.

III. Conclusion

In conclusion, we find that the trial court did not commit prejudicial error by overruling defense counsel's objection during the State's closing argument. Assuming without deciding that the prosecutor's comments about race were improper, we cannot conclude that defendant was prejudiced, given the context of the challenged argument, and the extensive evidence of defendant's guilt. Accordingly, we reverse the Court of Appeals' decision to award a new trial and remand to the Court of Appeals to rule on defendant's remaining arguments on appeal.

REVERSED AND REMANDED.

Justice EARLS concurring.

The trial court did not abuse its discretion in overruling defense counsel's two objections to the prosecution's statements regarding race and reasonable fear as it relates to defendant's claim of self-defense in this case. I write separately to address the issue that the majority

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3. Indeed, the jury convicted defendant of first-degree murder on two theories, premeditation and lying in wait. Although defendant argued to the Court of Appeals that there was insufficient evidence to instruct the jury on the State's theory of lying in wait, this issue is not before us. The dissenting judge would have found that there was sufficient evidence for the jury to convict defendant on the lying in wait theory, but the majority did not reach this issue. On remand, defendant is not precluded from making this argument again.

"assumes without deciding" because it is an issue of importance to our criminal justice system, controlled by our precedent and squarely presented by the facts of this case.

We should not assume a statement is improper when the propriety of the statement is the very heart of what matters to the administration of criminal justice and the jurisprudence of this State. The majority below thought the prosecutor's statements were a "prejudicial appeal to race and the jurors' 'sense of passion and prejudice.' " *State v. Copley*, 828 S.E.2d 35, 45 (N.C. Ct. App. 2019) (quoting *State v. Jones*, 355 N.C. 117, 132, 558 S.E.2d 97, 107 (2002)). The dissent concluded the prosecutor's statements were not an appeal to racial animosity. *Id.* at 46 (Arrowood, J., dissenting). We should decide which view is correct under the law of North Carolina.

The essential question is: was it improper, in light of the evidence in this case, for the prosecutor to argue to the jury that a fear based on race would not be a reasonable fear? That argument was proper in this case for two reasons. First, it was not an appeal to racial animosity. Second, statements made by jurors during jury selection, the evidence here concerning race-based statements made by individuals at the scene, and defendant's assertion of self-defense all combine to suggest that jurors potentially might have been swayed by their own conscious or unconscious racial biases instead of the evidence in the case. In these circumstances the prosecutor properly argued that it would not be reasonable for defendant to fear Kourey Thomas, the victim in this case, if that fear was based on the fact that Kourey Thomas was black.

Explicit appeals by a prosecutor to inflame jurors' racial biases are improper. *State v. Williams*, 339 N.C. 1, 24, 452 S.E.2d 345, 259 (1994) (citing *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2nd Cir. 1973); *State v. Wilson*, 404 So. 2d 968 (La. 1981)). "Official guidelines for prosecutors speak often and decisively against racist appeals. With doctrinal roots in the Constitution and professional ethics, the rule against prosecutorial summoning of 'that thirteenth juror, prejudice' has surfaced in nearly every jurisdiction and has occasioned numerous reversals." Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 Colum. L. Rev. 1212, 1213 (1992) (quoting *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 659 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 329 U.S. 742 (1946)). The archetypal appeal to racial bias involves a prosecutor using racial slurs, invoking race-based stereotypes, and referring to black defendants in derogatory racial terms. *See, e.g.*, *Bennett v. Stirling*, 842 F.3d 319, 324 (4th Cir. 2016) (holding improper appeal to

racial prejudice occurred where prosecutor's closing argument in case involving a black defendant "alternated between characterizing [defendant] as a primitive, subhuman species and a wild, vicious animal"); *Wilson*, 404 So. 2d at 970–71 (reversing first-degree murder convictions where prosecutor's closing argument, including referring to the black defendants as animals, was filled with direct and indirect appeals to the racial prejudices of the all-white jury); *State v. Monday*, 171 Wn.2d 667, 678–81, 257 P.3d 551, 557–58 (2011) (reversing conviction where prosecutor questioned witness credibility by arguing to the jury that "black folk don't testify against black folk").

In *Miller v. North Carolina*, the prosecutor in closing argument "ultimately argued that a defense based on consent was inherently untenable because no white woman would ever consent to having sexual relations with a black." 583 F.2d 701, 704 (4th Cir. 1978). This Court affirmed the convictions on the ground that even if the statement was improper, the error was harmless because the evidence against the defendants was overwhelming. *Id.* at 704–05. Noting that "an appeal to racial prejudice impugns the concept of equal protection of the laws," the Fourth Circuit reversed the convictions, holding that "there was prejudicial error of sufficient magnitude that even after a curative instruction there would remain doubt as to whether the prejudice was removed." *Id.* at 706–07. Whether direct racial slurs, or indirect appeals to racial prejudice, when a prosecutor seeks to invoke a jury's racial biases to obtain a conviction, such statements are improper. *See*, *e.g.*, *Monday*, 171 Wn.2d at 678, 257 P.3d at 557 ("Like wolves in sheep's clothing, a careful word here and there can trigger racial bias.").

Equally well established is the principle, followed by this Court in *Williams*, that "[n]onderogatory references to race are permissible, however, if material to issues in the trial and sufficiently justified to warrant 'the risks inevitably taken when racial matters are injected into any important decision-making.' " *Williams*, 339 N.C. at 24, 452 S.E.2d at 259, (quoting *McFarland v. Smith*, 611 F.2d 414, 419 (2nd Cir. 1979)). Indeed, courts routinely endorse a prosecutor's statements inquiring of prospective jurors whether they can fairly judge a black defendant in a case involving a white victim without reference to their own racial biases. *See*, *e.g.*, *Williams*, 339 N.C. at 23–25, 452 S.E.2d at 259–60 (legitimate to make nonderogatory references to race to ensure that racially biased prospective jurors were not seated on the jury); *see also Turner v. Murray*, 476 U.S. 28, 35–36 (1986) (inquiry into racial bias of jurors important because it is possible "for racial prejudice to operate but remain undetected," particularly in capital trials); Debra T. Landis,

Annotation, *Prosecutor's Appeal in Criminal Case to Racial, National, or Religious Prejudice as Ground for Mistrial, New Trial, Reversal, or Vacation of Sentence -- Modern Cases*, 70 A.L.R.4th 664 (1991) (collecting cases). *Cf.* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1563 (2013) (stating that studies indicate "making race salient or calling attention to the operation of racial stereotypes encourages individuals to suppress what would otherwise be automatic, stereotype-congruent responses and instead act in a more egalitarian manner. … [W]hen race is made salient, individuals tend to treat White and Black defendants the same."); Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. Rev. 1241, 1277 (2002) (stating that studies "suggest that there is good reason explicitly to instruct juries in every case, stereotype-salient or not, about the specific potential stereotypes at work in the case").

Also permissible is a prosecutor's argument that the defendant or perpetrator acted out of racial motivations, particularly where a racially-motivated hate crime is at issue but generally in any case where there is some evidence to suggest that race-based animus was a motive or factor in the crime. *See State v. Diehl*, 353 N.C. 433, 436, 545 S.E.2d 185, 187 (2001) ("Although it is improper gratuitously to interject race into a jury argument where race is otherwise irrelevant to the case being tried, argument acknowledging race as a motive or factor in a crime may be entirely appropriate."); *State v. Moose*, 310 N.C. 482, 492, 313 S.E.2d 507, 515 (1984) (white defendant's reference to African-American victim as a "damn nigger," and evidence that victim was driving through a white community, sufficient to support prosecutor's jury argument that murder was, in part, racially motivated).

Therefore, our caselaw has a two-part standard for evaluating the propriety of a prosecutor's statements referencing race. The first part of the inquiry is whether the statements are directly or indirectly an appeal based on derogatory racial stereotypes that seeks to encourage a jury to make a decision based on their own racial biases. If so, the statements are improper.

If the statements are not an appeal to racial animus in some form, blatant or subtle, the second part of the inquiry is whether a neutral or non-derogatory reference to race bears any material relevance to the facts of the case being tried. Such statements may be relevant because of the facts and circumstances of the crime, or because of facts that suggest a racial motivation on the part of the defendant, or both. If a prosecutor's

statements are ultimately found to be improper, the question remains whether the error in allowing those statements was harmless.

In addition to cases like *Williams*, where it was held to be permissible for a prosecutor to refer to race when seeking to ensure that jurors will not allow racial biases to infect their consideration of the evidence, an example of a non-derogatory reference to race that is not related to motive but nonetheless permissible is found in *State v. Barden*, 356 N.C. 316, 572 S.E.2d 108 (2002). In *Barden*, this Court held that it was proper for a prosecutor to refer to a victim's race in a non-derogatory fashion during closing argument. We held there that the prosecutor's references to the victim's race and national origin were permissible because they "were not designed to generate an issue of race in the trial. Instead, the prosecutor sought to remind the jury of the victim's humanity and to point out that, despite the victim's unexalted social status and modest economic means, his murder was as consequential as the killing of any other mortal." *Barden*, 356 N.C. at 365, 572 S.E.2d at 139 (citation omitted). *See also State v. Robinson*, 336 N.C. 78, 130, 443 S.E.2d 306, 332 (1994) (permissible for prosecutor in closing to argue that being black and poor was not the cause of defendant's criminal behavior and should not serve as an excuse). An example of permissible references to race related to defendant's motive is found in *Moose*, where this Court held that the prosecutor's repeated references to the victim as an "old black gentleman" and a "black man" were proper because the evidence was sufficient to raise an inference that his murder was, in part, racially motivated. *Moose*, 310 N.C. at 492, 313 S.E.2d at 515.

The record in this case shows that the prosecutor's references to race in his closing argument were non-derogatory, and that they were intended to ensure that the jury did not allow implicit stereotypes about the dangerousness of young black men to infect their determination of whether defendant established that he had a reasonable fear and acted lawfully in self-defense. In these circumstances, the statements were proper.

The majority details the statements made by the prosecutor that defendant objected to at trial. Those statements do not involve racial slurs nor do they attempt to inflame the jurors' passions or prejudices against black males. Equally, those statements are not derogatory towards white males like defendant in this case. The prosecutor did not use references to animals or animalistic behavior on anyone's part, and, unlike *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002), relied on by the majority in the Court of Appeals, the prosecutor did not refer to

other high-profile cases with analogous facts. The prosecutor did not attempt to link this case to the Trayvon Martin case or any other tragic case involving white men who have killed unarmed young black men. The prosecutor's argument did not involve derogatory references to race intended to invoke or inflame race-based animus in order to secure a conviction.

The remaining inquiry under our precedents is whether the statements were relevant to the facts of the case. In this case, the prosecutor's statements were relevant because jurors themselves had raised the issue of race during jury selection, defendant testified that the men outside his house had used racially charged language, and defendant asserted self-defense. The very first mention of any race-related aspect of this case came during jury selection when defendant's counsel asked a prospective juror "do you remember anything about comparisons to the famous George Zimmerman case in Florida?" At that point the prosecutor objected and the trial court sustained the objection.

Later during defense counsel's questioning of another prospective juror,[1] the prospective juror remarked that defense counsel had earlier "mentioned Zimmerman" and "the Trayvon Martin situation" and asked if this case involves race, to which defense counsel ambiguously replied "yeah." Defense counsel inquired further as to whether the prospective juror followed the case. When counsel asked what opinions the prospective juror had formed regarding our legal system in the aftermath of that case, the prosecutor objected and the trial court sustained the objection. Later during voir dire, the same prospective juror again brought up the Trayvon Martin case, its similarity to this case, and his feeling that justice did not prevail in that case. Thus, during jury selection, defense counsel and a prospective juror raised the "elephant in the room" relating to how attitudes about race and self-defense might impact the jury's deliberations in this case.

Defendant testified that after he yelled out his upstairs window to the group below, they yelled back at him, saying "go inside, white boy," and "things of that nature". The defense in this case turned on whether defendant was justified in shooting Kourey Thomas. Therefore, defendant's claim of self-defense required the jury to determine the reasonableness of defendant's fear that his life was in danger. It was proper and permissible for the prosecutor to urge the jury not to allow any racial

1. This prospective juror, Mr. Thompson, was later excused by defendant. However, six jurors who did serve on the jury were seated and present at the time of the most extensive discussion.

considerations or stereotypical assumptions about young black men to impact their ultimate decision about what was reasonable fear in these circumstances. Indeed, the prosecutor was trying to make sure the jury would make their decision based only on the evidence in the case.

The prosecutor's statements regarding race in his closing argument were not derogatory. Because the statements were relevant to the evidence in the case and the central issue of self-defense, they were proper. I concur in the majority's conclusion that this matter should be remanded for further consideration of the other errors raised by defendant that were addressed by the dissent below but not by the majority.

STATE OF NORTH CAROLINA
v.
KENNETH VERNON GOLDER

No. 79PA18

Filed 3 April 2020

1. Appeal and Error—plain error review—instructional and evidentiary errors in criminal cases—not sufficiency of the evidence

The Court of Appeals' statement that "defendant has not argued plain error" did not amount to announcement of a new rule that sufficiency of the evidence issues could be reviewed under the plain error standard. The Supreme Court reiterated that plain error applies to unpreserved instructional and evidentiary errors in criminal cases and that Appellate Procedure Rule 10(a)(3) governs the preservation of sufficiency of the evidence issues, to the exclusion of plain error review.

2. Appeal and Error—preservation of issues—challenges to sufficiency of the evidence—criminal cases

Defendant preserved each of his challenges to the sufficiency of the State's evidence—regarding aiding and abetting and obtaining a thing of value—by making a motion to dismiss at the close of the State's evidence and again at the close of all evidence in accordance with Appellate Rule 10(a)(3). The Supreme Court emphasized that merely moving to dismiss at the proper time in a criminal case under Rule 10(a)(3) preserves *all* sufficiency of the evidence issues, and the Court overruled a line of Court of Appeals cases that attempted

to categorize motions to dismiss based on the specificity of the motions.

3. Aiding and Abetting—elements—sufficiency of evidence—falsification of court documents

The State presented sufficient evidence that defendant aided and abetted a county clerk's office employee in a scheme to falsify court documents to secure remission of bail bond forfeitures where defendant met with the clerk's office employee and agreed to participate in the scheme, sent text messages instructing him to enter the fraudulent motions, and paid him for entering the motions. Defendant failed to support his argument that distinct evidence was required to satisfy each element of aiding and abetting.

4. False Pretense—sufficiency of evidence—attempt to obtain any thing of value—forfeited bail bonds

The State presented sufficient evidence to convict defendant of obtaining property by false pretenses where defendant attempted to reduce the amount that his bail bond company was required to pay as surety for forfeited bonds—a "thing of value" under N.C.G.S. § 14-100—by participating in a scheme in which he directed a county clerk of court employee to falsify court documents.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 257 N.C. App. 803, 809 S.E.2d 502 (2018), affirming judgments entered on 12 October 2015 by Judge Henry W. Hight Jr. in the Superior Court, Wake County. On 9 May 2019, the Supreme Court allowed the State's conditional petition for discretionary review. Heard in the Supreme Court on 9 December 2019.

Joshua H. Stein, Attorney General, by Michael T. Henry, Assistant Attorney General, for the State-appellee.

Anne Bleyman for defendant-appellant.

Glenn Gerding, Appellate Defender; and Southern Coalition for Social Justice, by John F. Carella and Ivy A. Johnson, for North Carolina Advocates for Justice, amicus curiae.

HUDSON, Justice.

Pursuant to petitions for discretionary review filed by defendant and the State, we review the following issues: (1) whether the Court

of Appeals erred in holding that defendant failed to preserve his challenges to the sufficiency of the State's evidence; (2) whether the State presented sufficient evidence that defendant aided and abetted another; and (3) whether the State presented sufficient evidence that defendant obtained a thing of value to support his obtaining property by false pretenses conviction. We conclude that defendant did preserve his challenges to the sufficiency of the evidence for appeal. However, because we conclude that the State presented sufficient evidence that defendant aided and abetted another and that he obtained a thing of value, we modify and affirm the decision of the Court of Appeals.

Factual and Procedural Background

On 25 February 2014, the Wake County grand jury returned a bill of indictment charging defendant with (1) obtaining property worth over $100,000 by false pretenses in violation of N.C.G.S. § 14-100; (2) accessing a government computer in violation of N.C.G.S. § 14-454.1; (3) altering court records in violation of N.C.G.S. § 14-221.2; (4) a misdemeanor bail bond violation under N.C.G.S. § 58-71-95; and (5) a misdemeanor for performing bail bonding without being qualified and licensed under N.C.G.S. § 58-71-40. The indictment arose from allegations that defendant and Kevin Ballentine, a public employee with the Wake County Clerk's Office, devised a scheme in which defendant would pay Ballentine to alter or falsify court documents to secure remission of bail bond forfeitures.

Before we summarize the evidence presented at trial, we briefly outline the statutory bail bond forfeiture procedures. Specifically, if a defendant is released on a bail bond under Chapter 15A, Article 26 of the General Statutes and "fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." N.C.G.S. § 15A-544.3(a) (2017). For purposes of this case, a surety on a bail bond includes a " 'Professional bondsman' mean[ing] any person who is approved and licensed by the Commissioner of Insurance under Article 71 of Chapter 58 of the General Statutes" and who provides cash or approved securities to secure a bail bond. N.C.G.S. § 15A-531(7)–(8) (2017); *see also id.* § 15A-531(8) (" 'Surety' means . . . insurance compan[ies], . . . professional bondsm[e]n, . . . [and] accommodation bondsmen."). The defendant and the sureties are notified of the entry of forfeiture by receiving a copy of the forfeiture by first-class mail. *Id.* § 15A-544.4(a)–(b) (2017). Importantly, the entry of forfeiture must contain "[t]he date on which the forfeiture will become a final judgment . . . if not set aside before that date." *Id.* § 15A-544.3(b)(8).

Under certain exclusive, statutorily-enumerated circumstances, an entry of forfeiture may be set aside, including by motion of either the defendant or a surety. N.C.G.S. § 15A-544.5 (b), (d) (2017); *see also id.* § 15A-544.5(c) (allowing relief from an entry of forfeiture in the event that the trial court enters an order striking the defendant's failure to appear). If neither the district attorney nor the county board of education files a written objection to the motion to set aside "by the twentieth day after a copy of the motion is served by the moving party[,] . . . the clerk shall enter an order setting aside the forfeiture, regardless of the basis for relief asserted in the motion, the evidence attached, or the absence of either." *Id.* § 15A-544.5(d)(4).

The evidence at trial here tended to show that Ballentine, who worked for the Wake County Clerk's Office in various capacities from 1999 until 2013, was involved in a scheme with defendant to exploit the automatic set-aside provision under N.C.G.S. § 15A-544.5(d)(4) in exchange for cash. Ballentine understood defendant to be working in the bail bond industry. Evidence produced at trial tended to show that defendant was not a licensed bail bondsman. Ballentine testified that the scheme began in 2006 or 2007 and continued until 2012. During that period, through text messages, defendant sent Ballentine lists with the names and file numbers of cases in which a bond forfeiture had been entered. After receiving a list of cases from defendant, Ballentine would enter a motion to set aside the bond forfeiture for each of the cases into the Wake County Clerk's Office's electronic records system, known as VCAP. Because no motion had actually been filed in the case by the parties, neither the district attorney nor the county board of education would receive notice of the motion and were without an opportunity to object. Therefore, after twenty days, the bond forfeiture would automatically be set aside. *See* N.C.G.S. § 15A-544.5(d)(4). As a result, defendant's bail bonding company would not be required to pay the bond as it otherwise would have been required to do if the forfeiture remained in effect.

In exchange for entering the motions to set aside into VCAP, defendant would pay Ballentine $500 for each list of cases. Ballentine testified that he received payment "normally once every other week" while he and defendant carried out this scheme. The payments were made in cash either by defendant leaving an envelope with the payment in Ballentine's truck, or meeting Ballentine in person. Ballentine ended his arrangement with defendant in November of 2012. Ballentine was eventually terminated from his position at the Wake County Clerk's Office as a result of his involvement in the scheme with defendant, as well as other similar schemes. In September of 2013, he began cooperating

with the State Bureau of Investigation concerning his involvement in the schemes.

At the close of the State's evidence at trial, defendant moved to dismiss. In moving to dismiss, defense counsel stated the following:

> Your Honor, at this time we certainly would like to make our motion to dismiss. As we are all aware, following the State's case in chief, this is our time to make such a motion.
>
> In giving the State the benefit of all reasonable inferences, we are quite confident that several of these charges should be dismissed, if not all, immediately.

Defense counsel then went on to address the individual charges, but did not specifically argue that the State failed to present sufficient evidence that defendant aided and abetted Ballentine in obtaining property by false pretenses, accessing a government computer, or altering court records. Defense counsel did, however, challenge defendant's obtaining property by false pretenses charge on the basis of several specific grounds. Defense counsel argued that the State's evidence was insufficient to prove that defendant obtained (1) a thing of value, because, at the time that Ballentine entered the motions to set aside the bond forfeitures, the prejudgment notice of forfeiture did not entitle the Wake County school board to an immediate interest in the bond amount; and (2) $100,000 worth of property. The trial court denied defendant's motion to dismiss. Defendant then presented evidence and testified on his own behalf.

At the close of all evidence, defendant again moved to dismiss the charges in open court. In making this motion, defense counsel stated that "[a]t this time we would certainly like to reiterate or readdress our motions . . . to dismiss." Defense counsel then went on to repeat defendant's earlier argument against his obtaining property by false pretenses charge, asserting that the State did not present sufficient evidence that defendant obtained property with a value of $100,000 or more. However, defense counsel did not specifically argue—as defense counsel did in the first motion to dismiss—that the State failed to prove that defendant obtained a thing of value. The trial court again denied defendant's motion to dismiss.

The jury then found defendant guilty of (1) obtaining property worth less than $100,000 by false pretenses; (2) accessing a government computer; (3) altering court records; and (4) unlicensed bail bonding. The trial court sentenced defendant to consecutive terms of imprisonment

totaling thirty-five to forty-three months for obtaining property by false pretenses, accessing a government computer, and altering court records. Defendant received an additional consecutive forty-five-day sentence as a result of his misdemeanor unlicensed bail bonding conviction. Defendant was also ordered to pay $480,100 in restitution. Defendant appealed his convictions to the Court of Appeals.

At the Court of Appeals, defendant argued, in pertinent part, that the State failed to present sufficient evidence that he (1) aided and abetted Ballentine in committing the felonies of obtaining property by false pretenses, accessing a government computer, or altering court records; and (2) obtained a thing of value, as required under the obtaining property by false pretenses statute. In support of his argument that the State failed to present sufficient evidence that he obtained anything of value, defendant repeated the same argument made by defense counsel to the trial court in the first motion to dismiss. Specifically, defendant argued that, at the time the false representations were made, neither the State nor the Wake County school board was entitled to an "immediate interest" in the bond amount.

The Court of Appeals disagreed, concluding that defendant waived his challenge to the sufficiency of the State's evidence of aiding and abetting "[b]ecause [d]efendant made several specific arguments when moving the trial court to dismiss certain charges, but did not challenge the State's aiding and abetting theory." *State v. Golder*, 257 N.C. App. 803, 811, 809 S.E.2d 502, 508 (2018). With regard to defendant's argument that the State's evidence was insufficient to prove that he obtained a thing of value, the Court of Appeals concluded that defendant waived his right to appellate review. *Id.* at 813–14, 809 S.E.2d at 508–09. Specifically, the Court of Appeals recognized that defense counsel argued in the first motion to dismiss "that elimination of contingent future interest in property does not fulfill the obtaining 'property' requirement." *Id.* at 813, 809 S.E.2d at 509. However, the Court of Appeals then reasoned that the second motion to dismiss, in which defense counsel only argued "that the dollar amount attributed to the thing of value obtained was less than alleged in the indictment, [ ] narrowed the scope of his objection, and that objection is all that would be reviewable by this Court." *Id.* at 813, 809 S.E.2d at 509. Accordingly, the Court of Appeals concluded that the only issue that was presented for review was the actual value of the property obtained and "[d]efendant [could not] argue [on appeal] that the evidence was insufficient because there was *no* thing of value." *Id.* at 813, 809 S.E.2d at 509.

We conclude that defendant preserved each of his challenges to the sufficiency of the evidence. However, because we conclude that the State presented sufficient evidence that defendant aided and abetted Ballentine, and that he obtained a thing of value, we modify and affirm the decision of the Court of Appeals.

Analysis

I. Plain error

[1] In defendant's petition for discretionary review, he requested that we review the issue of "[w]hether the Court of Appeals erred in announcing a new rule that the sufficiency of the evidence could be reviewed on appeal for plain error." Because the Court of Appeals did not actually announce a new rule that the sufficiency of the evidence can be reviewed for plain error, we conclude that the Court of Appeals did not err on this issue.

A. Standard of Review

"This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law." *State v. Melton*, 371 N.C. 750, 756, 821 S.E.2d 424, 428 (2018) (citing N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010)).

B. Discussion

We conclude that the Court of Appeals did not err because the court did not announce a new rule that sufficiency of the evidence issues can be reviewed under the plain error standard of review. Instead, the Court of Appeals merely recited Rule 10(a)(4) of the North Carolina Rules of Appellate Procedure and noted that "[d]efendant has not argued plain error." *Golder*, 257 N.C. App. at 811, 809 S.E.2d at 508. We do not interpret the court's statement that defendant did not argue plain error as the pronouncement of a new rule governing appellate review. However, we take this opportunity to reiterate that "[a]n appellate court will apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases." *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (citing *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012)). Further, this Court has expressly held that Rule 10(a)(3) (previously codified at Rule 10(b)(3)) governs the preservation of a sufficiency of the evidence issue, to the exclusion of plain error review. *See State v. Richardson*, 341 N.C. 658, 676–66, 462 S.E.2d 492, 504 (1995).

Because the Court of Appeals did not announce a new rule allowing for plain error review of sufficiency of the evidence issues, we conclude that the court did not err.

II. Preservation

[2] We conclude that defendant preserved each of his challenges to the sufficiency of the State's evidence with regard to both (1) the State's theory that he aided and abetted Ballentine in committing the offenses; and (2) that he obtained a thing of value. As discussed below, Rule 10(a)(3) of the Rules of Appellate Procedure provides that when a defendant properly moves to dismiss, the defendant's motion preserves all sufficiency of the evidence issues for appellate review. The Court of Appeals' conclusion to the contrary relied on (1) inapposite case law from our Court; and (2) a line of cases in which the Court of Appeals misinterpreted the extent to which a defendant's motion to dismiss preserves sufficiency of the evidence issues for appellate review.

A. Standard of Review

The standard of review for this issue is the same as the last issue.

B. Discussion

We conclude that defendant properly preserved each of his challenges to the sufficiency of the State's evidence for appellate review.

Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure provides that, in a criminal case, to preserve an issue concerning the sufficiency of the State's evidence, the defendant must make "a motion to dismiss the action . . . at trial." N.C. R. App. P. 10(a)(3). Rule 10(a)(3) also provides that:

> If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal . . . made at the close of [the] State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

Id.

However, although Rule 10(a)(3) requires a defendant to make a motion to dismiss in order to preserve an insufficiency of the evidence issue, unlike Rule 10(a)(1)–(2), Rule 10(a)(3) does not require that the defendant assert a specific ground for a motion to dismiss for

insufficiency of the evidence. *Id.*; *compare* N.C. R. App. P. 10(a)(3) *with* N.C. R. App. P. 10(a)(1)–(2) (requiring, as a general rule, that a defendant state the "grounds" for an objection, particularly when objecting to a jury instruction).

Accordingly, our Rules of Appellate Procedure treat the preservation of issues concerning the sufficiency of the State's evidence differently than the preservation of other issues under Rule 10(a). By not requiring that a defendant state the specific grounds for his or her objection, Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time.

This interpretation of Rule 10(a)(3) is consistent with this Court's recognition that a motion to dismiss places an affirmative duty upon the trial court to determine whether, when taken in the light most favorable to the State, there is substantial evidence for every element of each charge against the accused. *See State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) ("In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." (quoting *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 842–43 (2011))); *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) ("In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged." (quoting *State v. Allred*, 279 N.C. 398, 183 S.E.2d 553 (1971))); *State v. Stephens*, 244 N.C. 380, 383, 93 S.E.2d 431, 433 (1956) (". . . the trial court must determine whether the evidence taken in the light most favorable to the State is sufficient to go to the jury. That is, whether there is substantial evidence against the accused of every essential element that goes to make up the offense charged."). Because our case law places an affirmative duty upon the trial court to examine the sufficiency of the evidence against the accused for every element of each crime charged, it follows that, under Rule 10(a)(3), a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review.

Here, defendant made a proper motion to dismiss at the close of the State's evidence. Then, after defendant presented evidence, he made another motion to dismiss at the close of all evidence as required under Rule 10(a)(3). N.C. R. App. P. 10(a)(3). We hold that, under Rule 10(a)(3) and our case law, defendant's simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review.

The Court of Appeals erred to the extent that it held that defendant (1) waived appellate review of the sufficiency of the State's evidence that he aided and abetted Ballentine by not specifically making that argument to the trial court; and (2) narrowed the scope of appellate review of the sufficiency of the State's evidence for his obtaining property by false pretenses conviction with the argument he made in his second motion to dismiss. *Golder*, 257 N.C. App. at 811, 809 S.E.2d at 508.

In reaching its conclusion that defendant waived appellate review of the sufficiency of the State's evidence that he aided and abetted Ballentine, the Court of Appeals relied on inapposite case law from this Court. Before discussing the decision of the Court of Appeals, we note that the State points to our decision in *State v. Benson*, in which we held that in moving to dismiss, the party must argue a specific insufficiency of the evidence issue in order to preserve that issue for appellate review. 234 N.C. 263, 264, 66 S.E.2d 893, 894 (1951). In *Benson*, this Court concluded that although "[t]he defendant entered a general demurrer to the evidence and moved to dismiss," the general demurrer did not "present for decision the question [of] whether there was any sufficient evidence to support the count charging a conspiracy." 234 N.C. at 264, 66 S.E.2d at 894. We stated that "[i]f defendant desired to challenge the sufficiency of the evidence to establish a conspiracy, he should have directed his motion to that particular count." *Id.* at 264, 66 S.E.2d at 894.

However, *Benson* predated the Rules of Appellate Procedure and is now directly contrary to Rule 10(a)(3), which contains no requirement that a defendant state a specific ground to preserve an insufficiency of the evidence issue. *See* N.C. R. App. P. 10(a)(3) (first adopted in 1975). Accordingly, *Benson* is overruled to the extent that it is contrary to Rule 10(a)(3).

Turning to the decision of the Court of Appeals, the court heavily relied on our decision in *State v. Eason* for the proposition that "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *Golder*, 257 N.C. App. at 811, 809 S.E.2d at 507–08 (quoting *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991)). However, *Eason* applied then Rule 10(b)(1) of the Rules of Appellate Procedure, later recodified as Rule 10(a)(1). *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

As discussed above, issue preservation under Rule 10(a)(3) is not the same as preservation under Rule 10(a)(1), because Rule 10(a)(3) does not require that a defendant advance a specific ground for a motion to dismiss in order to preserve all challenges to the sufficiency of the evidence for appellate review. *Compare* N.C. R. App. P. 10(a)(1) *with* N.C. R. App. P. 10(a)(3). Accordingly, the Court of Appeals erred by relying on *Eason* to improperly insert the "specific grounds" requirement under Rule 10(a)(1) into Rule 10(a)(3).

Moreover, in holding that defendant waived appellate review of whether the State's evidence was sufficient to prove that he aided and abetted Ballentine, the Court of Appeals improperly relied on our decision in *State v. Garcia* for the proposition that "[m]atters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *Golder*, 257 N.C. App. at 811, 809 S.E.2d at 508 (quoting *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004)). *Garcia* involved the question of whether a constitutional issue had been preserved for review, not a challenge to the sufficiency of the evidence presented at trial. *See Garcia*, 358 N.C. at 410, 597 S.E.2d at 745 ("It is well settled that *constitutional matters* that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal." (emphasis added)) (citing *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003); N.C. R. App. P. 10(b)(1) (later recodified as Rule 10(a)(1))). It was error for the Court of Appeals to rely on a rule that specifically applies to the preservation of constitutional issues in denying defendant appellate review of the insufficiency of the evidence issue.

In reaching its conclusion that defendant waived appellate review of whether the State's evidence was sufficient to prove that he obtained something of value, the Court of Appeals relied on its own case law which has erroneously narrowed the scope of review preserved by a defendant's motion to dismiss. Specifically, the Court of Appeals relied on its opinion in *State v. Walker* to support its conclusion that defendant narrowed the scope of appellate review of his challenge to the sufficiency of the State's evidence to support his obtaining property by false pretenses charge in his second motion to dismiss. *Golder*, 257 N.C. App. at 813, 809 S.E.2d at 509 ("As in *Walker*, [d]efendant 'failed to broaden the scope of his motion when he renewed it following the close of all the evidence,' and therefore 'failed to preserve the issue[ ] of the sufficiency of the evidence as to the other elements of the charged offense[ ] on appeal.' " (quoting *State v. Walker*, 252 N.C. App. 409, 413, 798 S.E.2d 529, 532 (2017))).

Walker is one case in a line of cases in which the Court of Appeals has viewed a defendant's motion to dismiss as falling under one of three categories: (1) a "general," "prophylactic" or "global" motion, which preserves all sufficiency of the evidence issues for appeal; (2) a general motion, which preserves all sufficiency of the evidence issues for appeal, even though a defendant makes a specific argument as to certain elements or charges; and (3) a specific motion, which narrows the scope of appellate review to only the charges and elements that are expressly challenged. *See Walker*, 252 N.C. App. at 411–412, 798 S.E.2d at 530–31 ("In *State v. Chapman*, this Court applied the 'swapping horses' rule to a scenario in which the defendant argued before the trial court that the State presented insufficient evidence as to one element of a charged offense, and on appeal asserted the State presented insufficient evidence as to a different element of the same charged offense. . . . A general motion to dismiss requires the trial court to consider the sufficiency of the evidence on all elements of the challenged offenses, thereby preserving the arguments for appellate review." (citations omitted))). As discussed above, merely moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of the evidence for appellate review. Therefore, the Court of Appeals' jurisprudence, which has attempted to categorize motions to dismiss as general, specifically general, or specific, and to assign different scopes of appellate review to each category, is inconsistent with Rule 10(a)(3).

Accordingly, we conclude that each of defendant's challenges to the sufficiency of the State's evidence, both that he aided and abetted Ballentine and that he obtained a thing of value, are preserved for appellate review.

III. Sufficiency of the Evidence

Turning to the merits of each of defendant's challenges to his convictions, we conclude that the State presented sufficient evidence that defendant (1) aided and abetted Ballentine; and (2) obtained a thing of value to support the obtaining property by false pretenses charge.

A. Standard of Review

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (quoting *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002)). "Substantial evidence is [the] amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* (quoting *Mann*, 355 N.C. at 301, 560 S.E.2d at 781). In

evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). In other words, if the record developed at trial contains "substantial evidence, whether direct or circumstantial, or a combination, 'to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.' " *Id.* at 575, 780 S.E.2d at 826 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) (quoting *Crockett*, 368 N.C. at 720, 782 S.E.2d at 881).

B. Discussion

i. Aiding and Abetting

[3] As explained below, we conclude that the State presented sufficient evidence that defendant aided and abetted Ballentine in committing the offenses.

A person aids and abets another in committing a crime if "(i) the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citing *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996)). We have stated that:

> Mere presence, even with the intention of assisting in the commission of a crime, cannot be said to have incited, encouraged, or aided the perpetrator thereof, unless the intention to assist was in some way communicated to him; but, if one does something that will incite, encourage, or assist the actual perpetration of a crime, this is sufficient to constitute aiding and abetting.

State v. Hoffman, 199 N.C. 328, 154 S.E. 314, 316 (1930) (citations omitted).

Defendant challenges the sufficiency of the evidence presented by the State in support of its theory of aiding and abetting on the basis that the same evidence cannot be used to satisfy two of the elements of

aiding and abetting. Defendant argues that, as a result, the State's evidence that defendant paid Ballentine to fraudulently enter the motions to set aside cannot support more than one element. We are not persuaded by defendant's argument. Further, we note that the State presented substantial evidence that defendant aided and abetted Ballentine in committing the offenses.

First, defendant fails to provide support for his assertion that distinct evidence is needed to support each element. Specifically, defendant relies on our statement in *State v. Davis* that "[c]ausation of a crime by an alleged accessory is not 'inherent' in the accessory's counsel, procurement, command or aid of the principal perpetrator." 319 N.C. 620, 626, 356 S.E.2d 340, 344 (1987). Defendant's reliance on this language from *Davis* is misplaced. This language in *Davis* was meant to disavow our prior decision in *State v. Hunter* to the extent that *Hunter* concluded that a jury instruction was proper when it failed to inform the jury that a defendant's counsel to the perpetrator must have a causal connection to the crime in order for the defendant to be found to have aided and abetted the principal. *See id.* at 626, 356 S.E.2d at 344. Accordingly, the Court in *Davis* did not hold that multiple elements of aiding and abetting could not be supported by the same evidence. *See id.* at 626, 356 S.E.2d at 344.

Further, defendant relies on our decision in *Gallimore v. Marilyn's Shoes* for the proposition that distinct evidence is needed to support each element. 292 N.C. 399, 233 S.E.2d 529 (1977). Defendant's reliance on our decision in *Gallimore* is misplaced. *Gallimore* addressed whether a claimant's injury was compensable under the Workmen's Compensation Act and, therefore, that case is plainly inapplicable to resolving the issue here. *See Gallimore*, 292 N.C. at 402, 233 S.E.2d at 531. Accordingly, defendant has failed to support his rule that distinct evidence is needed in support of each element of aiding and abetting.

Second, in the light most favorable to the State, defendant's payments to Ballentine were only part of the evidence which tended to demonstrate defendant's guilt. Therefore, even assuming *arguendo* that single piece of evidence cannot be used to support multiple elements of aiding and abetting, the State presented sufficient evidence that defendant aided and abetted Ballentine. Specifically, the State presented evidence at trial that defendant (1) met with Ballentine and agreed to participate in the scheme; (2) sent text messages instructing Ballentine to enter the fraudulent motions to set aside in specific cases; and (3) paid Ballentine for entering the fraudulent motions. In the light most favorable to the State, the evidence tended to show that Ballentine entered the fraudulent motions, and that defendant "knowingly advised,

instigated, encouraged, procured, or aided" Ballentine. *Goode*, 350 N.C. at 260, 512 S.E.2d at 422 (citing *Bond*, 345 N.C. at 24, 478 S.E.2d at 175). In the light most favorable to the State, this evidence also tended to show that defendant's actions "caused *or contributed*" to Ballentine entering the fraudulent set aside motions. *Goode*, 350 N.C. at 260, 512 S.E.2d at 422 (emphasis added) (citing *Bond*, 345 N.C. at 24, 478 S.E.2d at 175).

Accordingly, we conclude that the State's evidence was sufficient to support defendant's conviction on the theory that defendant aided and abetted Ballentine in carrying out the scheme.

ii. Obtaining Property by False Pretenses

[4] We conclude that the State presented sufficient evidence that defendant obtained a thing of value to support his conviction for obtaining property by false pretenses.

A person obtains property by false pretenses when that person

> knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value

N.C.G.S. § 14-100 (2017).

Defendant challenges the sufficiency of the evidence supporting his conviction for obtaining property by false pretenses on the basis that the State presented insufficient evidence that defendant obtained a "thing of value" within the meaning of N.C.G.S. § 14-100. Specifically, defendant argues that "[i]n the light most favorable to the State, [defendant] did not obtain any property of the State or the School Board," because the fraudulent representations merely resulted in the "elimination of a potential future liability."

Assuming *arguendo* that the elimination of a potential future liability does not constitute "property" under N.C.G.S. § 14-100, that result is not dispositive. The statute does not only cover instances in which a defendant obtains "property," it also applies when a defendant "obtain[s] *or attempt*[*s*] to obtain . . . *any* . . . other thing of value." N.C.G.S. § 14-100 (emphases added). The fact that the statute imparts criminal liability when a defendant even *attempts* to obtain *any* "other thing of value"

guides this Court in deciding to apply a broader definition of "thing of value" than suggested by defendant. The evidence here shows that defendant and Ballentine, through their actions, attempted to surreptitiously divert attention from sums of bond money by altering bond forfeiture notations in court files. At a minimum, this was an attempt to reduce the amount that defendant's bail bond company was required to pay as surety for forfeited bonds and, therefore, constitutes a "thing of value" under N.C.G.S. § 14-100.

Accordingly, we conclude that defendant did obtain a "thing of value" under N.C.G.S. § 14-100 and, therefore, defendant's challenge to the sufficiency of the State's evidence to support his obtaining property by false pretenses conviction is unavailing.

Conclusion

Because we conclude that the State presented sufficient evidence that defendant aided and abetted Ballentine and that he obtained a thing of value, we affirm the decision of the Court of Appeals as to those issues. However, we modify the decision of the Court of Appeals because we conclude that defendant did preserve each of his challenges to the sufficiency of the State's evidence.

MODIFIED AND AFFIRMED.

TOWN OF PINEBLUFF
v.
MOORE COUNTY; CATHERINE GRAHAM, IN HER CAPACITY AS A COUNTY COMMISSIONER; NICK PICERNO, IN HIS OFFICIAL CAPACITY AS A COUNTY COMMISSIONER; OTIS RITTER, IN HIS CAPACITY AS A COUNTY COMMISSIONER; RANDY SAUNDERS, IN HIS CAPACITY AS A COUNTY COMMISSIONER; AND JERRY DAEKE, IN HIS CAPACITY AS A COUNTY COMMISSIONER

No. 398PA18

Filed 3 April 2020

Cities and Towns—extraterritorial jurisdiction—expansion—statutory requirements

A town lacked authority to extend its extraterritorial jurisdiction (ETJ) into certain proposed areas because N.C.G.S. § 160A-360(e) prohibited ETJ extensions where counties were enforcing zoning ordinances, subdivision regulations, and the State Building Code—unless the county approved the extension, which did not occur in this case. The Supreme Court rejected the town's argument that there was an irreconcilable conflict between the subsections of N.C.G.S. § 160A-360 as modified by Session Law 1999-35.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, published decision of the Court of Appeals, 821 S.E.2d 446 (N.C. Ct. App. 2018), affirming the trial court's entry of summary judgment and writ of mandamus entered on 5 December 2016 by Judge James M. Webb in Superior Court, Moore County. Heard in the Supreme Court on 4 February 2020.

David M. Rooks, for plaintiff-appellee.

Misty Randall Leland, County Attorney, and Elizabeth Curran O'Brien, Assistant County Attorney, for defendant-appellants.

HUDSON, Justice.

Here, we must determine whether the Court of Appeals erred by affirming the trial court's entry of summary judgment for plaintiff Town of Pinebluff (Pinebluff). The Court of Appeals reached its conclusion after determining that there was an irreconcilable conflict between N.C.G.S. § 160A-360(e) and N.C.G.S. § 160A-360(f) as amended by Session Law 1999-35, and that Session Law 1999-35 operated to invalidate the applicability of subsection (e) with regards to Pinebluff. Because we conclude that the Court of Appeals erred in its decision, we reverse.

I. Factual and Procedural Background

The facts of this case are uncontested; the parties have agreed that there are no issues as to any material fact.

In 1999, the General Assembly enacted Session Law 1999-35, a local act that amended North Carolina's extraterritorial jurisdiction (ETJ) statute, N.C.G.S. § 160A-360, as it pertains to Pinebluff. *See* An Act Relating to the Exercise of Extraterritorial Jurisdiction by the Town of Pinebluff, S.L. 1999-35, 1999 N.C. Sess. Laws 35.

On 19 July 2007, Pinebluff annexed approximately fifteen acres of land that officially extended the town's corporate boundaries. Several years later, in October 2014, Pinebluff requested that the Moore County Board of Commissioners adopt a resolution to authorize the expansion of Pinebluff's ETJ two miles beyond the annexed boundary, pursuant to N.C.G.S. § 160A-360, as modified by Session Law 1999-35. Pinebluff interpreted Session Law 1999-35 to require Moore County to approve the extension of ETJ. Moore County disagreed on the effect that Session Law 1999-35 had on N.C.G.S. § 160A-360 and, after several public hearings of the Moore County Planning Board and the Moore County Board of Commissioners, the Board of Commissioners voted unanimously to deny Pinebluff's request to extend the area of its ETJ.

Pinebluff filed a complaint against Moore County seeking a writ of mandamus directing the Board of Commissioners to adopt a resolution authorizing the ETJ expansion. Moore County moved to dismiss Pinebluff's claims and moved for judgment on the pleadings. Pinebluff then moved for summary judgment. The trial court issued an order denying Moore County's motions and allowing Pinebluff's motion for summary judgment. The court directed Moore County to adopt a resolution authorizing Pinebluff to exercise its ETJ within the area requested in its October 2014 resolution.

Moore County appealed the trial court's order to the Court of Appeals. The court unanimously affirmed the trial court's order, concluding that Session Law 1999-35 required Moore County to approve Pinebluff's ETJ expansion request. Moore County filed a petition for discretionary review, which we allowed on 14 August 2019.

II. Analysis

"We review a trial court's order granting or denying summary judgment de novo." *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (emphasis omitted) (citation omitted). This case also presents a question of statutory interpretation,

which we likewise review de novo. *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013) (quoting *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013)).

Session Law 1999-35 amended subsections (a) and (f) of N.C.G.S. § 160A-360 as they pertain to the Town of Pinebluff. The amendment to subsection (a) allows Pinebluff to extend its ETJ up to two miles beyond its corporate limits. S.L. 1999-35, § 1. We agree with the Court of Appeals that subsection (a) does not require approval from the county for an extension up to two miles. The amendment to subsection (f) allows Pinebluff to extend its ETJ two miles beyond an annexed area. S.L. 1999-35, § 2. When Pinebluff extends its ETJ under this subsection, the county must allow the extension so long as Pinebluff has presented proper evidence that the annexation has been accomplished. *Id.* ("[U]pon presenting proper evidence to the County Board of Commissioners that the annexation has been accomplished, the County Board of Commissioners shall adopt a resolution authorizing [Pinebluff] to exercise these powers within the extended area . . . described.").

However, subsections (a) and (f), as amended, must be read in the context of the rest of the statute, since we assume "that the Legislature acted with full knowledge of prior and existing law." *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977) (citing *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970)). Despite the fact that subsections (a) and (f) do not themselves impose restrictions on Pinebluff's authority to extend its ETJ within two miles of its corporate limits and annexed areas, we consider whether other subsections of N.C.G.S. § 160A-360 impose limitations on Pinebluff's ability to extend its ETJ into those areas.

Subsection (e) states that "[n]o city may . . . extend its [ETJ] powers . . . into any area for which the county at that time has adopted and is enforcing a zoning ordinance and subdivision regulations and within which it is enforcing the State Building Code." N.C.G.S. § 160A-360(e). The text also provides two exceptions to this rule: (1) where the county is not exercising each of the three powers enumerated in subsection (e) in the area, or (2) when the city and county have agreed on the area within which each will exercise its power. *Id.* Therefore, absent one of the exceptions, subsection (e) prohibits any city—including Pinebluff—from extending its ETJ into an area in which the county is exercising each of its three powers.

The Court of Appeals determined that, as to Pinebluff, subsection (e) was invalidated by subsection (f) as amended by Session Law

1999-35, which required the County Board of Commissioners to approve Pinebluff's ETJ expansion. 821 S.E.2d at 454. But we disfavor any interpretation that repeals by implication another portion of the statute. *See McLean v. Durham Cty. Bd. of Elections*, 222 N.C. 6, 8, 21 S.E.2d 842, 844 (1942) ("[T]he presumption is always against implied repeal. . . . [r]epeal by implication results only when the statutes are inconsistent, necessarily repugnant, utterly irreconcilable, or wholly and irreconcilably repugnant." (internal citations omitted)).

We read the statute in its entirety, harmonize its subsections, and "give effect to each" subsection. *Charlotte City Coach Lines, Inc. v. Bhd. of R.R. Trainmen*, 254 N.C. 60, 68, 118 S.E.2d 37, 43 (1961) (quoting *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956)) ("[I]t is a general rule that the courts must harmonize such statutes, if possible, and give effect to each . . . ."). We conclude that there is no irreconcilable conflict between subsections (e) and (f). Indeed, Session Law 1999-35 has no effect on subsection (e) and Pinebluff may extend its ETJ under subsections (a) and (f) only if the extension also complies with the provisions of subsection (e).

Thus, if Moore County is not exercising all three powers enumerated in subsection (e), Pinebluff may extend its ETJ up to two miles beyond its corporate limits under subsection (a) or beyond its annexed areas under (f) without seeking approval from the county. Likewise, if Moore County and Pinebluff reach an agreement on the area within which each will exercise its powers, Pinebluff may extend its ETJ up to two miles beyond its existing corporate limits under subsection (a) or beyond its annexed areas under (f) without seeking approval from the county. But where no agreement is in place and Moore County has adopted and is enforcing a zoning ordinance and a subdivision regulation, and is also enforcing the State Building Code, Pinebluff may not extend its ETJ into that area without approval of the county, regardless of whether the area falls within two miles of its corporate limits or an annexed area.

Here, Moore County was exercising all three powers under subsection (e) within Pinebluff's proposed ETJ expansion area: it had adopted and was enforcing a zoning ordinance and subdivision regulations, and was enforcing the State Building Code. Therefore, Pinebluff was not allowed to extend its ETJ into that area unless it reached an agreement with or received approval from Moore County. The county held public hearings and voted to deny Pinebluff's request, refusing to adopt a resolution that would allow Pinebluff to expand its ETJ. Thus, Moore County and Pinebluff did not reach an agreement, and the county did

not approve the requested resolution. Therefore, Pinebluff was prohibited from expanding its ETJ into that area.

III. Conclusion

Because we conclude there is no irreconcilable conflict between the subsections of N.C.G.S. § 160A-360 as modified by Session Law 1999-35, and that subsection (e) prohibits Pinebluff from extending its ETJ into the proposed areas without an agreement between Pinebluff and Moore County, we reverse the decision of the Court of Appeals affirming the trial court's entry of summary judgment and remand for further remand to the trial court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

DESMOND v. NEWS AND OBSERVER PUBL'G CO.

[374 N.C. 259 (2020)]

BETH DESMOND	)	
	)	
v.	)	WAKE COUNTY
	)	
THE NEWS AND OBSERVER PUBLISHING COMPANY AND MANDY LOCKE	)	

No. 132PA18-2

ORDER

Pursuant to 11 U.S.C. § 362(a)(1), the proceedings associated with defendants' appeal are stayed pending further order of the United States Bankruptcy Court for the Southern District of New York. The parties are directed to inform this Court if and when the bankruptcy court grants relief from the automatic stay provisions or when the automatic stay lapses.

By Order of this Court in Conference, this 1st day of April, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3 day of April, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

THE NEW HANOVER COUNTY BOARD OF EDUCATION	)	
v..	)	WAKE COUNTY
JOSHUA H. STEIN, IN HIS CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA	)	
AND	)	
NORTH CAROLINA COASTAL FEDERATION, INC. AND SOUND RIVERS, INC.	)	

No. 339A18

ORDER

Plaintiff' New Hanover County Board of Education's Petition for Rehearing is denied. This Court's 3 April 2020 opinion is modified as follows:

The final two sentences in footnote 8 are deleted. *New Hanover Cty. Bd. of Educ. v. Stein*, 840 S.E.2d 194, 209 n.8 (N.C. 2020). In their place, the following new sentences are inserted:

> Although 2019 N.C. Sess. Laws 250, § 5.7.(c) provided that newly-enacted N.C.G.S. § 147-76.1 became effective on 1 July 2019, and would be applicable to all funds received on or after that date, the parties agreed that the provisions of newly-enacted N.C.G.S. § 147-76.1 would not have the effect of mooting this appeal. As a result, we will refrain from attempting to construe N.C.G.S. § 147-76.1 or to apply its provisions to the facts of this case. We express no opinion as to what effect, if any, N.C.G.S. § 147-76.1 has on the agreement or on any past or future payments made thereunder.

By Order of the Court in Conference, this 18th day of May, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18 day of May, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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10A20	In the Matter of S.E.T.	1. Respondent-Father's Motion to Strike Portions of Petitioner's Brief 2. Petitioner's Motion to Amend Appellee Brief 3. Petitioner's Motion in the Alternative to File Rule 9(d) Supplement to the Record	1. Allowed **03/25/2020** 2. Denied **03/25/2020** 3. Denied **03/25/2020**
11A20	In the Matter of B.E. and J.E.	1. Respondent-Mother's Motion to Amend Brief 2. Respondent-Father's Motion to Amend Brief	1. Allowed **03/17/2020** 2. Allowed **03/17/2020**
17P20	State v. Kadeem Jaleel Grooms	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1211)	Denied
19P20	State v. Demoncrick Hunter	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-1029) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Deem PDR Timely Filed 4. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Dismissed *ex mero motu* 2. Dismissed 3. Denied 4. Denied
23P20	State v. George Allen Bigler	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Johnston County (COAP19-839) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
24A20	In the Matter of A.W.	1. Respondent-Mother's Motion for Consolidation of Actions on Appeal 2. Respondent-Mother's Alternative PDR and Consolidation	1. Allowed **03/18/2020** 2. Dismissed as moot **03/18/2020**
27A20	In the Matter of K.D.C. and A.N.C.	Respondent-Mother's Petition for Writ of Certiorari to Review Decision of District Court, Wilkes County	Allowed
28P20	State v. Donald Cole Burchett	Def's Pro Se Motion for Discretionary Review	Dismissed
30P20	State v. Henry Thomas Hairston	Def's PDR Under N.C.G.S. § 7A-31 (COA19-502)	Denied

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31P20	JVC Enterprises, LLC, as successor by merger to Geosam Capital US, LLC; Concord Apartments LLC; and The Villas of Winecoff, LLC f/k/a The Villas at Winecoff, LLC v. City of Concord	Defs' PDR Under N.C.G.S. § 7A-31 (COA19-308)	Allowed
37P20	State v. Mohammed Al-Hilo	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Henderson County (COAP18-461) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
38P20	State v. Anthony Cravon Webster	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-257)	Denied
40P20	State v. Leonard Paul Schalow	1. State's Motion for Temporary Stay (COA19-215) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Lift Temporary Stay	1. Allowed **01/27/2020** 2. Allowed 3. Allowed 4. Denied **Davis, J., recused**
44P20	State v. Billy Jackson Simmons, III	Def's PDR Under N.C.G.S. § 7A-31 (COA19-519)	Denied
49A20	State v. Faye Larkin Meader	1. Def's Motion for Temporary Stay (COA19-554) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent 4. Def's Motion for Extension of Time to File Brief	1. Allowed **02/07/2020** 2. 3. 4. Allowed **03/12/2020**
50P14-2	State v. James Allen Minyard	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Burke County (COAP19-17) 2. Def's Motion to Amend Petition for Writ of Certiorari	1. Dismissed 2. Allowed **Ervin, J., recused** **Davis, J., recused**

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57P20	State v. Alec Redner	1. Def's Pro Se Motion for Notice of Appeal for Discretionary Review (COAP20-38) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
62P20	State v. Andrew McCord	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-517)	Denied
63P12-2	State v. Herbert Marshall Pender, Jr.	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA11-647) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
64P20	State v. Tyree Devon Herring	Def's PDR Under N.C.G.S. § 7A-31 (COA19-221)	Denied
71A20	State v. Brandon Scott Goins	1. State's Motion for Temporary Stay (COA19-288) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **02/20/2020** 2. Allowed **03/12/2020** 3. ---
73A20	State v. Molly Martens Corbett and Thomas Michael Martens	1. State's Motion for Temporary Stay (COA18-714) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Defs' Joint Motion to Strike the State's Proposed Scope of Review 5. Defs' Joint Motion to Limit the Scope of Review to the Issues Set Out in the Dissent 6. Defs' Joint Motion to Amend Motion to Strike the State's Proposed Scope of Review and Motion to Limit the Scope of Review to the Issues Set Out in the Dissent 7. State's Conditional Petition for Writ of Certiorari to Review Decision of the COA 8. State's Motion for Extension of Time to File Brief	1. Allowed **02/24/2020** 2. Allowed **03/11/2020** 3. --- 4. 5. 6. 7. 8. Allowed **03/20/2020** **Davis, J., recused**

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76A20	In the Matter of M.J.R.B., Z.M.B., N.N.T.B., S.B.	1. Respondent-Father's Petition for Writ of Certiorari to Review Decision of District Court, Craven County 2. Respondent-Mother and Respondent-Father's Motion to Deem Joint Record on Appeal Timely Filed 3. Respondent-Mother and Respondent-Father's Motion in the Alternative, to Extend the Time to File Joint Record on Appeal 4. Respondent-Mother's Petition for Writ of Certiorari to Review Decision of District Court, Craven County	1. Allowed **03/17/2020** 2. Dismissed as moot **03/17/2020** 3. Dismissed as moot **03/17/2020** 4. Allowed **03/17/2020**
86P20	State v. Kenneth Jamaal Ray	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion for Petition for Direct Review 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **02/27/2020** 2. Dismissed **02/27/2020** 3. Allowed **02/27/2020**
87A20	In the Matter of R.L.O., L.P.O., C.M.O.	1. Respondent-Father's Motion to Deem Proposed Record on Appeal Timely Filed 2. Respondent-Father's Motion to Set Schedule for Filing Record on Appeal for 17 March 2020	1. Allowed **02/28/2020** 2. Allowed **02/28/2020**
93P20	State v. Cameron Lee Yarbrough	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/04/2020**
94P20	State v. Carlton Lashawn White	1. Def's Pro Se Motion for Notice of Constitutional Challenge to Statute 2. Def's Pro Se Motion to Intervene	1. Dismissed 2. Dismissed
100P16	Alberta Currie, Paris Vaughn, Cassandra Perkins, Mary Caitlyn Sanders, Hayley Farless, League of Women Voters of North Carolina, and North Carolina A. Philip Randolph Institute, Inc. v. The State of North Carolina and the North Carolina State Board of Elections	1. Defs' PDR Prior to a Decision of the COA (COA16-217) 2. Defs' Motion for Temporary Stay 3. Defs' Petition for Writ of Supersedeas 4. Plts' Motion for Extension of Time to File Response 5. Defs' Petition for Writ of Certiorari to Review Order of the COA 6. Plts' Motion to Dismiss Appeal	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed as moot **Morgan, J., recused** **Earls, J., recused**

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100P20	State v. Shanna Brandon	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/06/2020**
101PA15-3	State v. Christopher Anthony Clegg	Def's Motion to Supplement Record on Appeal (COA17-76)	Allowed **03/25/2020**
127P19	Gregory Painter v. City of Mt. Holly, acting as the Mt. Holly Police Department; Thomas Sperling, individually and in his official capacity as a Police Officer for the City of Mt. Holly; James Allen Benfield, individually and in his official capacity as Police Officer/ Captain for the City of Mt. Holly; the City of Belmont, acting as the City of Belmont Police Department; Chad Austin Alexander; Chris Small; and Tracy Small	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA18-197) 2. Plt's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Plt's Motion for Notice of Appeal and Alternative PDR to be Deemed Timely Filed 4. Plt's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Dismissed *ex mero motu* 2. Dismissed 3. Denied 4. Denied
128A20	Rickenbaugh v. Power Home Solar, LLC	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **03/20/2020** 2.
129P20	Hubert Allen v. Person County Superior Court	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Person County (COA13-1100)	Denied **03/20/2020** **Morgan, J., recused**
132PA18-2	Beth Desmond v. The News and Observer Publishing Company, McClatchy Newspapers, Inc., and Mandy Locke	Def's (The News and Observer Publishing Company, McClatchy Newspapers, Inc.) Notice of Bankruptcy Proceeding	Special Order
135P20	Wetherington v. NC Department of Public Safety	Respondent's Motion for Temporary Stay (COA18-1018)	Allowed **03/25/2020**

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143P20	Henderson v. Vaughn	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County (COAP15-854) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 3. Petitioner's Pro Se Motion to Appoint Counsel	1. Denied **03/26/2020** 2. Allowed **03/26/2020** 3. Dismissed as moot **03/26/2020**
151P20	State v. Michael Allen Bullock	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **04/01/2020**
158P19	Jacqueline L. Gray and Mary Stewart Gray v. Federal National Mortgage Association a/k/a Fannie Mae, and Trustee Services of Carolina, LLC, Substitute Trustee	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA18-871) 2. Legal Aid of North Carolina, Inc.'s Motion for Leave to File Amicus Brief in Support of PDR 3. Def's (Trustee Services of Carolina, LLC) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot 3. Dismissed as moot **Davis, J., recused**
241PA19	Parkes v. Hermann	1. Amicus' (NC Medical Society, et al.) Motion to Allow for Additional Time for Argument of Amicus Party (COA18-888) 2. Amicus' (NC Medical Society, et al.) Motion in the Alternative to Participate and Share Time in Argument of Defendant-Appellee	1. Denied **03/04/2020** 2. Denied **03/04/2020**
243P19	State v. Gregory K. Parks	Def's PDR Under N.C.G.S. § 7A-31 (COA18-520)	Denied
254P18-3	State v. Jimmy A. Sevilla-Briones	1. Def's Pro Se Motion for Discovery Requests (COAP17-645) 2. Def's Pro Se Petition for Writ of Habeas Corpus 3. Def's Pro Se Motion to Amend and Append Record Filings 4. Def's Pro Se Motion for Full Review	1. Dismissed **02/28/2020** 2. Denied **02/28/2020** 3. Dismissed **02/28/2020** 4. Dismissed **02/28/2020**
270A18-2	State v. Thomas Earl Griffin	1. State's Motion for Temporary Stay (COA17-386; COA17-386-2) 2. State's Petition for Writ of Supersedeas	1. Allowed **03/06/2020** 2. **Davis, J., recused**

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274P15-6	State v. Robert K. Stewart	1. Def's Pro Se Petition for Writ of Mandamus (COAP15-68; COAP18-294) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Denied **03/13/2020** 2. Allowed **03/13/2020** 3. Dismissed as moot **03/13/2020**
282P19	Sidney B. Harr v. WRAL-5 News, James F. Goodmon	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-88)	Denied
284P19	North Carolina Indian Cultural Center, Inc. v. Machelle Sanders, Secretary, N.C. Department of Administration, in her official capacity, Furnie Lambert, Chairman, N.C. State Commission of Indian Affairs, in his official capacity, N.C. Department of Administration, N.C. Commission of Indian Affairs, State of North Carolina, and Paul Brooks	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-807)	Denied
296A19	Wells Fargo Bank, N.A. v. Frances J. Stocks, in his capacity as the executor of the Estate of Lewis H. Stocks a/k/a Lewis H. Stocks, III, Tia M. Stocks, and Jeremy B. Wilkins in his capacity as commissioner	1. Plt's Notice of Appeal Based Upon a Dissent (COA18-1171) 2. Plt's PDR as to Additional Issues 3. Def's (Tia M. Stocks) Motion to Dismiss Appeal 4. Def's (Frances J. Stocks, in his capacity as executor) Notice of Appeal Based Upon a Dissent 5. Def's (Frances J. Stocks, in his capacity as executor) PDR as to Additional Issues 6. Def's (Tia M. Stocks) Motion to Dismiss Appeal	1. --- 2. Allowed 3. Denied 4. --- 5. Allowed 6. Denied

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300A93-3	State v. Norfolk Junior Best	1. Def's Motion to Hold in Abeyance the Time in Which to File a Petition for Writ of Certiorari from Denial of MAR 2. Def's Motion for Extension of Time to File Petition for Writ of Certiorari 3. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Bladen County 4. Def's Motion to Allow Counsel to Withdraw and Authorize IDS to Appoint Substitute Counsel	1. Dismissed as moot **02/28/2020** 2. Allowed **03/08/2018** 3. Allowed **05/09/2019** 4. Allowed **02/28/2020** **Ervin, J., recused**
308P19	State v. Ismael Marquez Camacho	Def's Pro Se Motion for PDR (COAP17-708)	Dismissed
318P19	State v. Timothy Lavaun Crumitie	Def's PDR Under N.C.G.S. § 7A-31 (COA18-781)	Denied
324A19	State v. Jack Howard Hollars	1. Def's Motion for Appropriate Relief (COA18-932) 2. State's Motion for Extension of Time to File Response to Motion for Appropriate Relief 3. State's (Matthew W. Sawchak) Motion to Withdraw as Counsel of Record	1. 2. Allowed **03/16/2020** 3. Allowed **03/30/2020**
337P19	Asma Hanif v. Attorney Sonya Davis (In the Matter of: the William Edward & Arsenia Davis Estate Belongings)	Petitioner's Pro Se Motion for Petition the Court for Justice in the Matter of William Edward & Arsenia Davis Estate Belongings	Dismissed
344P19	State v. Jacquel Levell Holliday	1. Def's Motion for Temporary Stay (COA18-1144) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/04/2019** Dissolved **04/01/202**0 2. Denied 3. Denied
356P17-3	State v. Brandon Lee	1. Def's Pro Se Motion for Notice of Appeal (COAP19-785) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed
361P19	State v. Taveun Dayquan Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA18-559)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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372P19	Clayton Bache, Employee v. TIC-Gulf Coast, Employer, Self-Insured (Sedgwick CMS, Servicing Agent)	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-788)	Denied
383A19	Newman v. Stepp	1. Def's Notice of Appeal Based Upon a Dissent (COA19-112) 2. Plts' Motion for Continuance from March 10, 2020, Oral Arguments Calendar	1. --- 2. Allowed **03/09/2020**
392A19	State v. Bruce Wayne Glover	Def's Motion to Amend Reply Brief (COA18-538)	Allowed **03/06/2020**
397A19	In the Matter of O.W.D.A.	Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Henderson County	Allowed **03/10/2020**
404P19	State v. Joshua Dustin Lutz	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1291)	Denied
408P19	In the Matter of S.P. and J.P.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA18-1190)	Denied
412P13-5	State v. Henry Clifford Byrd, Sr.	Petitioner's Pro Se Petition for Writ of Habeas Corpus (COA17-288; COAP13-424)	Denied **03/16/2020** **Ervin, J., recused**
412P19	In the Matter of the Foreclosure of a Deed of Trust Executed by Rebecca Worsham and Greg B. Worsham Dated January 8, 2007 and Recorded in Book 21638 at page 600 in the Mecklenburg County Public Registry, North Carolina	Respondents' PDR Under N.C.G.S. § 7A-31 (COA18-1302)	Denied
421P19	State v. Thomas Allen Cheeks	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-884) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

3 APRIL 2020

431A19	In the Matter of W.I.M.	Parties' Joint Motion for the Court to Hear the Case Based on the Briefs Filed	Allowed **03/04/2020**
434PA18	PHG Asheville, LLC v. City of Asheville	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA18-251) 2. Respondent's Motion to Supplement the Record on Appeal 3. Petitioner's Motion to Dismiss Appeal as Moot 4. Petitioner's Motion to Supplement Appellate Record	1. Allowed **05/09/2019** 2. Allowed **08/14/2019** 3. Denied 4. Allowed **12/04/2019**
457P19	Sharell Farmer v. Troy University, Pamela Gainey, and Karen Tillery	1. Plt's PDR Prior to a Determination by the COA (COA19-1015) 2. Def's Motion to Dismiss Appeal	1. Denied 2. Denied
464P19	State v. Darwin Josue Peralta	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-374) 2. Def's Motion to Include COA Opinion with PDR	1. Denied 2. Allowed
469P19	State v. Roderick Jermaine Boykins	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA18-949) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
472P19	State v. Clarence Wendell Roberts	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1194)	Denied
487P19	In the Matter of T.G.H., Y.G.L., S.N.L.	1. Respondent-Father's Motion for Temporary Stay (COA18-1314) 2. Respondent-Father's Petition for Writ of Supersedeas 3. Respondent-Father's PDR	1. Allowed **12/27/2019** Dissolved **04/01/2020** 2. Denied 3. Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

3 APRIL 2020

490P19	Morguard Lodge Apartments, LLC d/b/a The Lodge at Crossroads v. Warren Follum	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA18-1014)	1. ---
		2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	2. Denied
		3. Plt's Motion to Dismiss Appeal	3. Allowed
		4. Def's Pro Se Motion for Extension of Time to File Response to Motion to Dismiss PDR and Appeal	4. Allowed **01/24/2020**
		5. Def's Pro Se Emergency Motion for Extension of Time to File Response to Motion to Dismiss PDR and Appeal	5. Allowed **01/31/2020**
		6. Def's Pro Se Motion to Strike Response in Opposition to Notice of Appeal; in the Alternative PDR	6. Dismissed as moot
		7. Plt's Motion to Strike Defendant's Reply in Favor of PDR	7. Dismissed as moot
		8. Def's Pro Se Motion to Strike Plaintiff's Response in Opposition to Defendant's PDR and Dismissing Defendant's Appeal	8. Dismissed as moot **Davis, J., recused**
492P19	Discover Bank v. Raleigh Rogers	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-217)	1. ---
		2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	2. Denied
		3. Plt's Emergency Motion for Extension of Time to Respond to Notice of Appeal and PDR	3. Dismissed as moot
		4. Plt's Motion to Dismiss Appeal	4. Allowed
493P19	Cheryle Jernigan Wicker v. Gilles Andre Wicker	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-1212)	1. ---
		2. Plt's Motion to Withdraw PDR	2. Allowed **02/28/2020** **Davis, J., recused**

ORDER AMENDING THE NORTH CAROLINA BUSINESS COURT RULES

Pursuant to Section 7A-34 of the General Statutes of North Carolina, the Court hereby amends Rule 11 and Appendix 1 of the North Carolina Business Court Rules.

* * *

Rule 11. Mediation

11.1. Mandatory mediation. All mandatory complex business cases and cases assigned to a Business Court judge pursuant to Rule 2.1 of the General Rules of Practice are subject to the ~~Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions~~Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions. Although these statewide mediation rules require participation in a mediation utilizing a certified mediator unless the Court orders otherwise on a showing of good cause, the parties may engage in multiple mediated settlement conferences before the same or different mediators.

11.2. Selection and appointment of mediator. The parties should attempt to select a mediator by agreement. The Case Management Report should contain either the parties' agreement or, in the absence of an agreement, each party's nominee of a certified mediator for appointment by the Court. If all parties cannot agree on a mediator, then the Court will appoint a mediator from the list of certified mediators maintained by the North Carolina Dispute Resolution Commission.

11.3. Report of mediator. Within ten days of the conclusion of the mediation, the mediator must mail or e-mail a copy of his or her report to the Court, in addition to filing the report with the Clerk of Superior Court in the county of venue.

11.4. Notification of settlement. The parties are encouraged to keep the Court apprised of the status of settlement negotiations and should notify the Court promptly when the parties have reached a settlement.

* * *

Appendix 1. Notice of Designation Template

STATE OF NORTH CAROLINA COUNTY OF _____ JOHN DOE, Plaintiff, v. ABC CORPORATION, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CIVIL ACTION NO.: **NOTICE OF DESIGNATION**

Pursuant to N.C.G.S. § 7A-45.4, [INSERT PARTY] seeks to designate the above-captioned action as a mandatory complex business case. In good faith and based on information reasonably available, [INSERT PARTY], through counsel, hereby certifies that this action meets the criteria for:

_____ Designation as a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4(a), in that it involves a material issue related to:

_____ (1) Disputes involving the law governing corporations, except charitable and religious organizations qualified under N.C.G.S. § 55A-1-40(4) on the grounds of religious purpose, partnerships, and limited liability companies, including disputes arising under Chapters 55, 55A, 55B, 57D, and 59 of the General Statutes.

_____ (2) Disputes involving securities, including disputes arising under Chapter 78A of the General Statutes.

_____ (3) Disputes involving antitrust law, including disputes arising under Chapter 75 of the General Statutes that do not arise solely under N.C.G.S. § 75-1.1 or Article 2 of Chapter 75 of the General Statutes.

_____ (4) Disputes involving trademark law, including disputes arising under Chapter 80 of the General Statutes.

_____ (5) Disputes involving the ownership, use, licensing, lease, installation, or performance of intellectual property, including computer software, software applications, information technology and systems, data and data security, pharmaceuticals, biotechnology products, and bioscience technologies.

_____ ~~(6)~~(8) Disputes involving trade secrets, including disputes arising under Article 24 of Chapter 66 of the General Statutes.

_____ ~~(7)~~(9) Contract disputes in which all of the following conditions are met:

(a) At least on e plaintiff and at least one defendant is a corporation, partnership, or limited liabilitycompany, including any entity authorized to transact business in North Carolina under Chapter 55, 55A, 55B, 57D, or 59 of the General Statutes.

(b) The complaint asserts a claim for breach of contract or seeks a declaration of rights, status, or other legal relations under a contract.

(c) The amount in controversy computed in accordance with N.C.G.S. § 7A-243 is at least one million dollars ($1,000,000).

(d) All parties consent to the designation. [If all parties have not consented, indicate that the Notice of Designation is conditional pursuant to BCR 2.5.]

_____ Designation as a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4(b), in that it is an action:

_____ (1) Involving a material issue related to tax law that has been the subject of a contested tax case for which judicial review is requested under N.C.G.S. § 105-241.16, or a civil action under N.C.G.S. § 105-241.17 containing a constitutional challenge to a tax statute.

_____ (2) Described in subsection (1), (2), (3), (4), (5), or (8) of N.C.G.S. § 7A-45.4(a) in which the amount in controversy computed in accordance with N.C.G.S. § 7A-243 is at least five million dollars ($5,000,000).

Briefly explain why the action falls within the specific categories checked above and provide information adequate to determine that the case has been timely designated (e.g., dates of filing or service of the complaint or other relevant pleading). If necessary, include additional information that may be helpful to the Court in determining whether this case is properly designated a mandatory complex business case.

Attach a copy of all significant pleadings filed to date in this action (e.g., the complaint and relevant pending motions).

[INSERT DATE AND SIGNATURE BLOCKS]

* * *

These amendments to the North Carolina Business Court Rules become effective on 1 March 2020.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 26th day of February, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of February, 2020.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING STANDING COMMITTEES AND BOARDS OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 25, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning standing committees and boards of the State Bar, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for the Administrative Committee

.0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedures for Enforcement of Obligations of Membership

. . .

(b) Notice

Whenever it appears that a member has failed to comply, in a timely fashion, with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the secretary shall prepare a written notice directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law.

(c) Service of the Notice

The notice shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service (such as Federal Express or UPS), return receipt requested, to the last known address of the member contained in the records of the North Carolina State Bar or such later address as may be known to the person attempting service. Service of the notice may also be accomplished by (i) personal service by a State Bar investigator or by any person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging

such service. **A member who cannot, with reasonable diligence, be served by registered or certified mail, designated delivery service, personal service, or email shall be deemed served upon publication of the notice in the State Bar *Journal*.**

NORTH CAROLINA

WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of February, 2020.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 26th day of February, 2020.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 26th day of February, 2020.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING STANDING COMMITTEES AND BOARDS OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 25, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning standing committees and boards of the State Bar, as particularly set forth in 27 N.C.A.C. 1D, Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization

.1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) The applicant must be licensed in a jurisdiction of the United States for at least five years immediately preceding his or her application and must be licensed in North Carolina for at least three years immediately preceding his or her application. The applicant must be currently in good standing to practice law in this state and the applicant's disciplinary record with the courts, the North Carolina State Bar, and any other government licensing agency must support qualification in the specialty.

(b) . . .

(d) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for certification for specialization. However, there shall be no waiver of the requirements that the applicant pass a written examination ~~and~~ **or of the minimum years of practice requirements set out in paragraph (a)(1) above** ~~be licensed to practice law in North Carolina for five years preceding the application~~.

NORTH CAROLINA

WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2019.

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Alice Neece Mine, Secretary

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Cheri L. Beasley, Chief Justice

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This the 26th day of February, 2020.

s/Mark A. Davis
For the Court

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The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 25, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning standing committees and boards of the State Bar, as particularly set forth in 27 N.C.A.C. 1D, Section .2600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2600, Certification Standards for the Immigration Law Specialty

.2605 Standards for Certification as a Specialist in Immigration Law

Each applicant for certification as a specialist in immigration law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in immigration law:

(a) Licensure and Practice . . .

. . .

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge, skills, and proficiency in immigration law. The examination shall be in written form and shall be given **either** annually **or every other year as the Board deems appropriate**. The examination shall be administered and graded uniformly by the specialty committee.

NORTH CAROLINA

WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of February, 2020.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 26th day of February, 2020.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

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This the 26th day of February, 2020.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 2020.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0119 Standards for Certification of Paralegals

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) Education or Work Experience. The applicant must have earned one of the following requirements:

(A) an associate's, bachelor's, or master's degree from a qualified paralegal studies program;

(B) a certificate from a qualified paralegal studies program and an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Department of Education (an accredited US institution) or an equivalent degree from a foreign educational institution if the degree is determined to be equivalent to a degree from an accredited US institution by an organization that is a member of the National Association of Credential Evaluation Services (NACES) or the Association of International Credentials Evaluators (AICE); ~~or~~

(C) a juris doctorate degree from a law school accredited by the American Bar Association; or

(D) a high school diploma or equivalent plus five years of experience (comprising 10,000 work hours) as a legal assistant/paralegal or paralegal educator and, within the

twelve months prior to the application, completed one hour of CLE on the topic of professional responsibility. Demonstration of work experience may be established by sworn affidavit(s) from the lawyer(s) or other supervisory personnel who has knowledge of the applicant's work as a legal assistant/paralegal during the entirety of the claimed work experience.

(2) National Certification. If an applicant has obtained and thereafter maintains in active status at all times prior to application (i) the designation Certified Legal Assistant (CLA)/Certified Paralegal (CP) from the National Association of Legal Assistants; (ii) the designation PACE-Registered Paralegal (RP)/Certified Registered Paralegal (CRP) from the National Federation of Paralegal Associations; or (iii) another national paralegal credential approved by the board, the applicant is not required to satisfy the educational or work experience standard in paragraph (a)(1).

(3) Examination. The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability. The board shall assure that the contents and grading of the examinations are designed to produce a uniform minimum level of competence among the certified paralegals.

NORTH CAROLINA

WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2020.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of February, 2020.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 26th day of February, 2020.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 26th day of February, 2020.

s/Mark A. Davis
For the Court

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2020-01

April 9, 2020

QUESTION:

Under what circumstances may a judge participate in truancy court programs created by local school districts?

CONCLUSION:

While judges may attend school programs to generally educate parents and students about truancy-related issues and court processes, judges should not participate as volunteer "judges" in school-sponsored truancy intervention programs in which the judge engages directly with specific at-risk families, appears to "preside" over dockets, or participates as a member of a "truancy team" to assist a particular family or review the details of truancy issues in specific cases. Judges also should avoid any participation that suggests that the judge is exercising any official judicial duties as part of the program or is compelling attendance in the program, such as by sending a "summons" or other notices to families directing them to appear in court or elsewhere for school-sponsored programs.

DISCUSSION:

Canon 4 provides generally that a judge may engage in outside quasi-judicial activities, including those relating to the educational system. Canon 4A through 4C describe generally the types of permissible quasi-judicial activities, including speaking, writing, lecturing and teaching (Canon 4A), appearing at public hearings or consulting with officials (Canon 4B), and serving on the boards of civic, charitable or governmental entities (Canon 4C). Because judges have a duty to hear and decide cases, however, they must avoid civic activities that would require frequent disqualification or would otherwise reasonably call into question the judge's ability to be fair and impartial. As such, Canon 4 places limits on a judge's quasi-judicial activities and requires that such activities may be undertaken "subject to the proper performance of the judge's judicial duties" and only if such activities "do not cast substantial doubt on the judge's capacity to decide impartially any issue that may come before the judge." On a more general level, Canon 2A also requires that judges conduct themselves "at all times in a manner the promotes public confidence in the integrity and impartiality of the judiciary." To further ensure that judges are perceived as impartial, Canon 3C requires judges to recuse themselves in cases in which their impartiality may

reasonably be questioned, including where the judge has "personal knowledge of disputed evidentiary facts concerning the proceedings" (Canon 3C(1)(a)) or where the judge "has been a material witness" concerning the matter in controversy (Canon 3C(1)(b)). Finally, under Canon 2B, judges are also prohibited from using the prestige of the judicial office to advance or promote the interests of non-judicial entities, which would include programs promoted by local school districts no matter how beneficial to the community.

In keeping with these rules, judges should not participate in truancy intervention programs in which the judge is expected to meet individually with parents, school counselors, prosecutors and others to evaluate the facts and develop strategies to address that specific family's truancy issues. This includes "presiding" over informal truancy dockets in schools or courtrooms or otherwise appearing as a "judge" when meeting with families outside of official court proceedings. Having such personal involvement with a particular case would require disqualification in that case if it eventually resulted in a juvenile, criminal or other proceeding involving those family members. In addition, judges should not create the appearance that they are acting with official authority in participating in truancy intervention programs established in local school districts. This includes not only "presiding" over school-sponsored truancy meetings while wearing a judicial robe, but also issuing a "summons" or other notice on behalf of the program to direct families to appear at truancy mediations, hearings or meetings. Nothing in this opinion is intended to suggest that truancy intervention programs do not serve beneficial community interests, nor does it preclude volunteer participation by judges to educate parents and students in group settings about court processes and procedures involved in truancy matters, nor does it preclude a judge from serving in an advisory capacity for such programs generally. Those activities are permissible under Canon 4A and Canon 4B.

References:
Canons 1, 2A, 2B, 3C, 4, 4A, 4B and 4C of the North Carolina Code of Judicial Conduct.

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